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# TRANSCRIPT OF RECORD

# SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1925

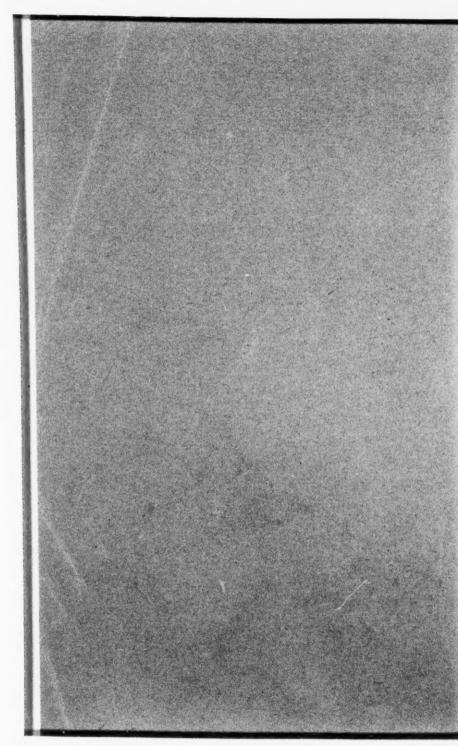
No. 498

THE UNITED STATES OF AMERICA, PLAINTIFF IN

REUEL D. ROBBINS, JR., AND SADIE M. ROBBINS, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF R. D. ROBBINS, ETC.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR

PERM MAY 11, 100



# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1925

### No. 493

# THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR

VS.

REUEL D. ROBBINS, JR., AND SADIE M. ROBBINS, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF R. D. ROBBINS, ETC.

#### IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA

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- In United States District Court for the Northern District of 1 California, Southern Division
- R. D. ROBBINS, JR., AND SADIE M. ROBBINS, AS EXECUTORS) of the Last Will and Testament of R. D. Robbins, also known as Reuel Drinkwater Robbins, also known as Reuel D. Robbins, deceased, plaintiffs

UNITED STATES OF AMERICA, DEFENDANT

Bill of complaint filed March 30, 1925

The plaintiffs herein, for a cause of action against the defendant, United States of America, allege:

I

At all times herein mentioned the defendant, United States of America, was and still is a sovereign lody politic.

#### II

R. D. Robbins, jr., and Sadie M. Robbins are, and at all times herein mentioned were, the executors of the last will and testament of R. D. Robbins, also known as Reuel Drinkwater Robbins, also known as Reuel D. Robbins, deceased, and bring this action in their capacity as such executors. Plaintiffs are, each of them, citizens of the United States and residents of and domiciled in the State of California, and have at all times borne true allegiance to the Government of the United States of America, and have not in any way aided or given encouragement to rebellion against the said Government, nor at any time aided or abetted in any

manner, or given comfort to, any sovereign or government that is, or ever has been, at war with said United States.

#### III

The said R. D. Robbins, also known as aforesaid, was a citizen of said United States and a resident of the State of California, and died in the city and county of San Francisco. State aforesaid, on the 7th day of September, 1919; the said R. D. Robbins, also known as aforesaid, had at all times prior to his death borne true allegiance to the said Government of the United States, and had not in any way aided, abetted, or given encouragement to rebellion against the said Government, or at any time aided or abetted in any manner or given comfort to any sovereign or government that is or ever has been at war with said United States.

#### IV

The said R. D. Robbins, also known as aforesaid, died leaving a last will and testament, which was duly admitted to probate, by order in that behalf duly made and given, of the Superior Court in and for the State of California, having jurisdiction in the premises, on the 29th day of September, 1919, and letters testamentary thereon were thereupon issued to these plaintiffs, as such executors, by the said court, on said 29th day of September, 1919. A full, true, and correct copy of said last will and testament and of said letters testamentary is hereto annexed, made a part hereof, and marked Exhibit "A."

On the 19th day of January, 1871, at the city of Fairfield, Solano County, State of California, the said R. D. Robbins, also known as aforesaid, and the plaintiff, Sadie M. Robbins, also known as Sadiatha Robbins, intermarried and became husband and wife, and they ever since continued to be and were such husband and wife up to and at the time of the death of said R. D. Robbins, also known as aforesaid, and during all of said time they resided and were domiciled in the State of California, and since the said death of the said R. D. Robbins, also known as aforesaid, the said Sadie M. Robbins has been and still is a resident of and domiciled in said State of California.

#### VI

All of the estate of said R. D. Robbins, also known as aforesaid, was the community property of said R. D. Robbins and his said wife, and the said R. D. Robbins, also known as aforesaid, in said last will and testament declared that all of his estate was community property under the laws of the State of California. The said estate consisted of real and personal property, situate in said State of California.

#### VII

These plaintiffs, in their capacity as such executors, make claim against defendant herein for a refund from such defendant of the sum of six thousand seven hundred eighty-eight and 03/100 dollars (\$6,788.03) as and for income tax overpaid by said R. D. Robbins, also known as aforesaid, to the said defendant, for the calendar year 1918, in respect to the income from the community property of said R. D. Robbins, also known as aforesaid, and his said wife, and the facts in respect thereto are these:

For said calendar year 1918, and in the year 1919, and prior to the 15th day of March of 1919, the said R. D. Robbins, also known as aforesaid, paid to the defendant, United States of America, by payment to its then collector of internal revenue for the northern

district of California, as and for income tax for said calendar year 1918, the sum of eleven thousand and seventy-nine and 46/100 dollars (\$11,079.46). Said sum was then and there received

by said collector from said R. D. Robbins, also known as aforesaid, and by said collector transmitted to and received by the defendant, United States of America; and the defendant has ever since retained and now has the same. Said income so paid as aforesaid for said calendar year 1918 was required by the Treasury Department of the United States of America pursuant to regulations in that behalf made and enforced by said department to be reported, and the same was accordingly reported for said calendar year by said R. D. Robbins, also known as aforesaid, to the said collector of internal revenue, in one return by said R. D. Robbins, also known as aforesaid, in distinction from its being reported in separate returns by said R. D. Robbins, also known as aforesaid, and his said wife, respectively. The income so reported and paid for the said calendar year was required by said Treasury Department, pursuant to regulation in that behalf made and enforced by said department, to be computed, based, assessed, collected, and paid, and was accordingly computed, based, assessed, collected, and paid, by and to said United States of America on said mentioned return. But for the requirements and regulations aforesaid of the said Treasury Department, the said R. D. Robbins, also known as aforesaid, and his said wife, would have made, each of them, a separate return for said calendar year of said income, each reporting therein one-half of said income, instead of the said one return made as aforesaid by the said R. D. Robbins, also known as aforesaid.

The said income for said calendar year 1918, so reported as aforesaid by the said R. D. Robbins, also known as aforesaid, was derived wholly from the community property of said R. D. Robbins, also known as aforesaid, and his said wife. The said community property was wholly acquired by the said R. D. Robbins, also

known as aforesaid, and his said wife after their marriage aforesaid, and no part thereof was acquired by said husband and wife, or either of them, by gift, bequest, devise or descent, and the said income so reported as aforesaid, was derived wholly from said community property, so acquired as aforesaid, and consisted of rents and issues of real and personal property for said calendar year, and of moneys earned by and paid to said R. D. Robbins, also known as aforesaid, during and for said calendar year, as salaries, fees, and commissions for services rendered during said calendar year.

If, for said calendar year 1918, instead of the said income being so computed, assessed, reported, collected, and paid as aforesaid, the same had been divided for income-tax purposes, and the said husband and wife had each reported in separate returns one-half thereof, the amount of such income tax for said calendar year, computed, assessed, collected, and payable on each of said separate returns, would have been the sum of four thousand two hundred

ninety-one and 43/100 dollars (\$4,291.43), making a difference between the sum actually reported and paid as aforesaid, namely, the sum of eleven thousand and seventy-nine and 46/100 dollars (\$11,079.46), and the said sum of four thousand two hundred ninety-one and 43/100 dollars (\$4,291.43), thus attributable to separate return by said husband of six thousand seven hundred eighty-eight and 03/100 dollars (\$6,788.03), the amount of the claim and refund for which these plaintiffs, in their capacity as executors of the last will and testament of said R. D. Robbins, also known as aforesaid, are making claim against the defendant and bringing this action.

#### IX

On April 27, 1922, these plaintiffs, in their capacity as such executors aforesaid, made and filed demand to and with the 6 Commissioner of Internal Revenue of the United States of America for the refund of said sum of six thousand seven hundred eighty-eight and 03/100 dollars (\$6,788,03) upon the ground, set forth in such demand, that said last-mentioned sum was erroneously collected by the defendant, in the manner aforesaid, from said R. D. Robbins, also known as aforesaid, in this, to give the words of said demand: "that the income and profits tax return of the decedent, Reuel D. Robbins, for the year 1918, was computed without reference to the community interest of the wife therein"; and that, "using the revised returns submitted to the department by Internal Revenue Agent Joseph T. O'Connor, dated May 7, 1921, and computing the tax upon a community basis," the "amount of tax overpaid" was six thousand seven hundred eighty-eight and 03/100 dollars (\$6,788.03). X

No part of said "amount of tax overpaid" has been refunded or repaid by the defendant; said claim for refund has never been acted upon by the said Commissioner of Internal Revenue, and more than six months have elapsed since the said claim for refund was made and filed, as aforesaid, to and with said Commissioner of Internal Revenue.

Said executors, in their capacity as such, are the sole owners of the claim sued upon here, and no assignment or transfer of the same, or any part thereof, or of any interest therein, has been made; no action upon said claim, other than as herein set forth, has been taken in Congress, or by any of the departments of the Government,

or in any court, other than the complaint filed in this court, and there are no just or other credits or offsets to or against said claim.

Wherefore, these plaintiffs, in their capacity as such executors aforesaid, pray judgment against the defendant in the sum of six

thousand seven hundred eighty-eight and 03/100 dollars (\$6,788.03), with legal interest, and costs of suit.

LLOYD M. ROBBINS, ROBBINS, ELKINS & VAN FLEET,

San Francisco.

DUNNE, BROBECK, PHLEGER & HARRISON,

San Francisco.

PRESTON & DUNCAN,

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San Francisco.

O'Melveny, Millikin, Tuller & MacNeil, Los Angeles, California. Attorneus for said Plaintiffs.

[Sworn to by R. D. Robbins, jr.; jurat omitted in printing.]

Exhibit "A" to bill of complaint

I, R. D. Robbins of the town of Suisun City, Solano County, State of California, being of sound and disposing mind, do make, publish, and declare this my last will and testament in manner following, that is to say:

Article First. I declare all of my estate, real, personal, and mixed, to be community property, of which my beloved wife Sabiatha Robbins is entitled to an undivided half in her own right, and it is not my intention to deprive or attempt to deprive her of such undivided half.

Article Second. I give, devise, and bequeath all of my estate subject to my testamentary disposition, real, personal, and mixed, of every nature and kind, and wheresoever situated and whether now owned or hereafter acquired by me, to my beloved children. Reuel D. Robbins, jr., Mary Emma Robbins Sutton, John Lloyd McCullough Robbins, Mina Hoyt Robbins, W. C. Robbins, Irving W. Robbins, in equal shares, share and share alike.

Article Third. I hereby revoke all other and former wills by me made and do hereby appoint my said wife, Sabiatha Robbins, executrix and my son Reuel D. Robbins, jr., executor of this my last will and testament and guardians of the estates of my minor children. And it is my desire and I so direct that no bonds be required from them or either of them either as such executors or such guardians.

Article Fourth. Any advancements which I have made or may hereafter make to any of my children shall be deducted from his or her share of my said estate.

In witness whereof I have hereunto set my hand and seal this 4th day of June, 1900.

R. D. ROBBINS. [SEAL.]

The foregoing instrument was, at the date hereof, by the said R. D. Robbins, signed and sealed and published as, and declared to be, his

last will and testament in presence of us, who, at his request, and in his presence, and in the presence of each other have subscribed our names as witnesses hereto.

A. L. Reed, residing at Fairfield, Solano County, Cal. J. T. Cooper, residing at Suisun, Solano County, Cal.

Endorsed:

Filed Sept. 15, 1919. G. G. HALLIDAY, Clerk.

10 In the Superior Court of the County of Solano, State of California. Probate

#### Letters testamentary

In the matter of the estate of R. D. Robbins, also known as Reuel Drinkwater Robbins, also known as Reuel D. Robbins, deceased

STATE OF CALIFORNIA.

County of Solano, 88:

The last will of R. D. Robbins, deceased, a copy of which is hereto annexed, having been proved and recorded in the Superior Court of the County of Solano, Sadie M. Robbins, executrix, and Reuel D. Robbins, jr., who are named therein as such, are hereby appointed executors.

Witness G. G. Halliday, clerk of the Superior Court of the County of Solano, with the seal of the court affixed, the 29th day of Sep-

tember, A. D. 1919.

By order of the court.
[SEAL.]

G. G. HALLIDAY, Clerk.

STATE OF CALIFORNIA,

County of Solano:

I do solemnly swear that I will support the Constitution of the United States and the constitution of the State of California, and that I will faithfully perform, according to law, the duties of executrix and executor, respectively, of the last will and testament of R. D. Robbins, deceased.

SADIE M. ROBBINS. REUEL D. ROBBINS, Jr.

Subscribed and sworn to before me this 29th day of September, 1919.

[SEAL.]

G. G. Halliday, Clerk.

STATE OF CALIFORNIA,

County of Solano, 88:

I, G. G. Halliday, county clerk of the county of Solano, State of California, and ex officio clerk of the Superior Court in and for said county, hereby certify the within and foregoing to be a full, true, and correct copy of letters testamentary issued in the therein entitled matter as the same remains of record and on file in the office

of said clerk. I further certify that said letters have not been revoked.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 25th day of March, A. D. 1925.

(Indorsed:) No. 4212. Superior Court County of Solano. Probate. In the matter of the estate of R. D. Robbins, deceased. Letters testamentary. Filed for record Sept. 29th, A. D. 1919, and recorded in Book No. 9, letters testamentary and of administration, page 601. Records of Solano County, California. G. G. Halliday, clerk.

11 [File indorsement omitted.]

In United States District Court

Summons and marshal's return, filed April 2, 1925

[Title omitted.]

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The President of the United States of America to the United States of America, defendant, greeting:

You are hereby directed to appear and answer the complaint in an action entitled as above, brought against you in the District Court of the United States in and for the Northern District of California, second division, within ten days after the service on you of this summons, if served within this county, or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required the said plaintiff will take judgment for any money or damages demanded in the complaint, as arising upon contract, or will apply to the court for any other relief demanded in the complaint.

Witness the Honorable John S. Partridge, judge of said district court, this thirtieth day of March, in the year of our Lord one thousand nine hundred and twenty-five and of our independence the one

hundred and forty-ninth.

SEAL.

WALTER B. MALING,

Clerk.

By J. A. Schaertzer, Deputy Clerk.

United States Marshal's Office, Northern District of California.

I hereby certify that I received the within writ on the 30th day of March, 192, and personally served the same on the 30th day of March, 1925, upon United States of America by delivering to and leaving with Sterling Carr, the United States attorney for the northern district of California, on behalf of said defendant named therein personally, at the city and county of San Francisco in said

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district a certified copy thereof, together with a copy of the complaint attached thereto.

Fred L. Esola, U. S. Marshal, By Geo. H. Burnham, Office Deputy.

San Francisco, March 30, 1925.

In United States District Court

[Title omitted.]

Affidavit of K. W. Allbin filed April 20, 1295

STATE OF CALIFORNIA,

City and County of San Francisco.

K. W. Allbin, being first duly sworn, deposes and says:

That she is a citizen of the United States, over the age of twenty-one years and a clerk in the office of Robbins, Elkins and Van Fleet, attorneys for petitioners and plaintiffs in the above-entitled action: that she mailed a copy of the petition filed in the above-entitled action by registered letter to the Attorney General of the United States by depositing a copy of said petition enclosed in an envelope, sealed and addressed, to Honorable John G. Sargent, Attorney General of the United States, Department of Justice, at Vermont Avenue and Fifteenth Street, Washington, D. C., and registering the same in the United States post office of the city and county of San Francisco, postage and registration fees prepaid, on the 17th day of April, 1925, at the hour of 2.30 o'clock p. m.

K. W. ALLBIN.

Subscribed and sworn to before me this 17th day of April, 1925.

[SEAL.]

W. W. HEALEY,

Notary Public in and for the City and County of San Francisco, State of California.

[File endorsement omitted.]

In United States District Court

[Title omitted.]

14

Answer filed April 20, 1925

Comes now the defendant, and for answer to the complaint Denies each and every allegation, matter, and thing in the said complaint contained. Wherefore the said defendant, having fully answered, prays that plaintiffs take nothing by their said action but that defendant

recover proper costs.

Sterling Carr,
United States Attorney,
T. J. Sheridan,
Asst. United States Attorney,
A. W. Gregg,
Solicitor of Internal Revenue,
Frederick W. Dewart,
Special Assistant to the Attorney General,
Attorneys for Defendant.

15 Received a copy of the within answer this 20th day of

April, 1925.

LLOYD M. ROBBINS,
ROBBINS, ELKINS AND VAN FLEET,
DUNNE, BROBECK, PHLEGER & HARRISON,
PRESTON AND DUNCAN,
O'MELVENY, MILLIKIN, TULLER & MACNEIL,
Attorneys for Plaintiff.

[File endorsement omitted.]

16 In U

In United States District Court

[Title omitted.]

Agreed statement of facts filed April 20, 1925

It is hereby stipulated and agreed in the above-entitled cause that the facts of the said controversy are as follows:

#### I

R. D. Robbins, jr., and Sadie M. Robbins are, and at all times herein mentioned were, the executors of the last will and testament of R. D. Robbins, also known as Reuel Drinkwater Robbins, also known as Reuel D. Robbins, deceased, and bring this action in their capacity as such executors. Plaintiffs are, each of them, citizens of the United States and residents of and domiciled in the State of California, and have at all times borne true allegiance to the Government of the United States of America, and have not in any way aided or given encouragement to rebellion against the said Government, nor at any time aided or abetted in any manner, or given comfort to any sovereign or government that is or ever has been at war with said United States.

#### II

That said R. D. Robbins was a citizen of the said United States and a resident of the State of California, and died in the city and county of San Francisco, State aforesaid, on the 7th day of September, 1919; the said R. D. Robbins had at all times prior to his death borne true allegiance to the said Government of the United States, and had not in any way aided, abetted, or given encouragement to rebellion against the said Government, nor at any time aided or abetted in any manner, or given comfort to any sovereign or government that is or ever has been at war with said United States.

#### III

The said R. D. Robbins died leaving a last will and testament, which was duly admitted to probate, by order in that behalf duly made and given, of the Superior Court in and for the State of California, having jurisdiction in the premises, on the 29th day of September, 1919, and letters testamentary thereon were thereupon issued to these plaintiffs, as such executors, by the said court on said 29th day of September, 1919.

#### IV

On the 19th day of January, 1871, at the city of Fairfield, Solano County, State of California, the said R. D. Robbins and the plaintiff Sadie M. Robbins, also known as Sadiatha Robbins, intermarried and became husband and wife, and they ever since continued to be and were such husband and wife up to and at the time of the death of said R. D. Robbins, and during all of said time they resided and were domiciled in the State of California, and since the said death of the said R. D. Robbins the said Sadie M. Robbins has been and still is a resident of and domiciled in said State of California.

#### V

All of the estate of said R. D. Robbins was the community property of said R. D. Robbins and his said wife. The said estate consisted of real and personal property situate in said State of California.

18 VI

For the calendar year 1918 and prior to the 15th day of March, 1919, the said R. D. Robbins paid to the defendant, United States of America, by payment to its then collector of internal revenue for the northern district of California, as and for income tax for the said calendar year 1918, the sum of eleven thousand seventy-nine and 46/100 dollars (\$11,079.46). Said sum was then and there received by said collector from said R. D. Robbins and by said col-

lector transmitted to and received by the defendant, United States of America, and the defendant has ever since retained and now has the same. Said income reported for said calendar year 1918 was required by the Treasury Department of the United States of America pursuant to regulations in that behalf made and enforced by said department to be reported, and the same was accordingly reported for said calendar year by said R. D. Robbins to the said collector of internal revenue in one return by said R. D. Robbins in distinction from its being reported in separate returns, one-half each by said R. D. Robbins and his said wife, respectively. The income tax so paid for the said calendar year was required by said Treasury Department pursuant to regulations in that behalf made and enforced by said department, to be computed, based, assessed, collected, and paid, and was accordingly computed, based, assessed, collected, and paid by and to said United States of America on said mentioned return. But for the requirements and regulations aforesaid of the said Treasury Department the said R. D. Robbins and his said wife would have made, each of them, a separate return for said calendar year of said income, each reporting therein one-half of said income, instead of the said one return made as aforesaid by the said R. D. Robbins.

#### VIII

The said net taxable income for said calendar year 1918, so reported as aforesaid by the said R. D. Collins, was derived fifty thousand eight hundred seventy-four and 09/100 dollars (\$50,874.09) as rents and issues of real and personal property, 19 all of which was the community property of said R. D. Robbins and his said wife, all of which had been acquired by said community before the year 1917. The said community property was wholly acquired by the said R. D. Robbins and his wife after their marriage aforesaid and prior to the year 1917, and no part thereof was acquired by said husband and wife, or either of them, by gift, bequest, devise, or descent, and the said sum of fifty thousand eight hundred seventy-four and 09/100 dollars (\$50.874.09) was derived wholly and from the rents and issues of the said community property. That in addition in the net taxable income for said calendar year 1918 so reported as aforesaid by said R. D. Robbins was included the sum of seventeen thousand seven hundred fortyseven and 00/100 dollars (\$17,747.00) of moneys earned by and paid to said R. D. Robbins during and for said calendar year 1918 as salaries, fees, and commissions for services rendered during said calendar year.

If, for said calendar year 1918, instead of the said income being so reported and paid on as aforesaid, the same had been divided for income tax purposes, and the said husband and wife had each reported in separate returns one-half thereof, the amount of such income tax for said calendar year computed, assessed, collected, and payable on each of said separate returns would have been the sum

of four thousand two hundred ninety-one and 43/100 dollars (\$4,291.43), making a difference between the sum actually reported and paid as aforesaid, namely eleven thousand and seventy-nine and 46/100 dollars (\$11,079.46), and the said sum of four thousand two hundred ninety-one and 43/100 dollars (\$4,291.43), thus attributable to separate return by said husband of six thousand seven hundred eighty-eight and 03/100 dollars (\$6,788.03), the amount of the claim and refund for which these plaintiffs, in their capacity as executors of the last will and testament of said R. D. Robbins, are making claim against the defendant and bringing this action.

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Thereafter these plaintiffs, in their capacity as such executors aforesaid, duly made and filed demand to and with the Commissioner of Internal Revenue of the United States of America for the refund of said sum of six thousand seven hundred eighty-eight and 03/100 dollars (\$6,788.03) upon the ground set forth in such demand, that said last-mentioned sum was erroneously collected by the defendant, in the manner aforesaid, from said R. D. Robbins, in that the income and profits tax return of the said R. D. Robbins for the year 1918 was computed without reference to the community interest of the wife therein.

No part of said amount of six thousand seven hundred eighty-eight and 03/100 dollars (\$6.788.03) has been refunded or repaid by the defendant; said claim for refund has never been acted upon by the said Commissioner of Internal Revenue, and more than six months had elapsed prior to the commencement of this action after the said claim for refund was made and filed, as aforesaid, to and with said Commissioner of Internal Revenue.

X

Said executors, in their capacity as such, are the sole owners of the claim sued upon here, and no assignment or transfer of the same, or any part thereof, or of any interest therein has been made; no action upon said claim, other than as herein set forth, has been taken in Congress, or by any of the departments of the Government, or in any

court, other than the complaint filed in this court.

LLOYD M. ROBBINS,
ROBBINS, ELKINS, AND VAN FLEET,
DUNNE, BROBECK, PHLEGER, AND HARRISON,
PRESTON AND DUNCAN,
O'MELVENY, MILLIKIN, TULLER, AND MACNEIL,

Attorneys for Plaintiffs.

Sterling Carr, United States Attorney, T. J. Sheridan, Asst. United States Attorney, A. W. Gregg, Solicitor of Internal Revenue, F. W. Dewart,

Special Asst. to the Attorney General, Attorneys for Defendant.

[File endorsement omitted.]

#### In United States District Court

[Title omitted.]

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## Findings of fact and conclusion of law

The above-entitled cause having been duly heard, argued, and submitted on an agreed statement of facts made and signed by Lloyd M. Robbins, Peter F. Dunne, Carey Van Fleet, Robbins, Elkins & Van Fleet, Dunne, Brobeck, Phleger & Harrison, Preston & Duncan, of San Francisco, California: O'Melveny, Millikin, Tuller & Macneil, of Los Angeles, California, attorneys for plaintiffs; and by Sterling Carr, United States attorney; T. J. Sheridan, assistant United States attorney; Frederick W. Dewart, special assistant to the Attorney General; for the defendant, now, the court, in accordance with said agreed statement of facts, makes the following

FINDINGS OF FACT

#### I

R. D. Robbins, jr., and Sadie M. Robbins are, and at all times herein mentioned were, the executors of the last will and testament of R. D. Robbins, also known as Reuel Drinkwater Robbins, also known as Reuel D. Robbins, deceased, and bring this action in their capacity as such executors. Plaintiffs are, each of them, citizens of the United States and residents of and domiciled in the State of California, and have at all times borne true allegiance to

the Government of the United States of America, and have not in any way aided or given encouragement to rebellion against the said Government, nor at any time aided or abetted in any manner or given comfort to any sovereign or government that is or ever has been at war with said United States.

#### H

That said R. D. Robbins was a citizen of the said United States and a resident of the State of California, and died in the city and county of San Francisco, State aforesaid, on the 7th day of September, 1919; the said R. D. Robbins had at all times prior to his death borne true allegiance to the said Government of the United States, and had not in any way aided, abetted, or given encouragement to rebellion against the said Government, nor at any time aided or abetted in any manner, or given comfort to any sovereign or government that is or ever has been at war with said United States.

#### III

The said R. D. Robbins died leaving a last will and testament, which was duly admitted to probate, by order in that behalf duly made and given, of the Superior Court in and for the State of California, having jurisdiction in the premises, on the 29th day of September, 1919, and letters testamentary thereon were thereupon issued to these plaintiffs, as such executors, by the said court on said 29th day of September, 1919.

#### IV

On the 19th day of January, 1871, at the city of Fairfield, Solano County, State of California, the said R. D. Robbins and the plaintiff Sadie M. Robbins, also known as Sadiatha Robbins, intermarried and became husband and wife, and they ever since continued to be and were such husband and wife up to and at the time of the death of said R. D. Robbins, and during all of said time they

resided and were domiciled in the State of California, and since the said death of the said R. D. Robbins, the said Sadie M. Robbins has been and still is a resident of and domiciled

in said State of California.

#### V

All of the estate of said R. D. Robbins was the community property of said R. D. Robbins and his said wife.

The said estate consisted of real and personal property situate

in said State of California.

#### VI

For the calendar year 1918 and prior to the 15th day of March, 1919, the said R. D. Robbins paid to the defendant, United States of America, by payment to its then collector of internal revenue for the northern district of California, as and for income tax for the said calendar year 1918, the sum of eleven thousand seventy-nine and 46/100 dollars (\$11,079.46). Said sum was then and there received by said collector from said R. D. Robbins, and by said collector transmitted to and received by the defendant, United States of America, and the defendant has ever since retained and now has the same. Said income reported for said calendar year 1918 was required by the Treasury Department of the United States of America pursuant to regulations in that behalf made and enforced by said department to be reported, and the same was accordingly reported for said calendar year by said R. D. Robbins to the said collector of internal revenue in one return by said R. D. Robbins, in distinction from its being reported in separate returns one-half each by said R. D. Robbins and his said wife, respectively. The income tax so paid for the said calendar year was required by said Treasury Department, pursuant to regulations in that behalf made and enforced by said department, to be computed, based, assessed, collected, and paid, and was accordingly computed, based, assessed, collected, and paid by and to said United

States of America on said mentioned return. But for the requirements and regulations aforesaid of the said Treasury Department, the said R. D. Robbins and his said wife, would

have made each of them, a separate return for said calendar year of said income, each reporting therein one-half of said income, instead of the said one return made as aforesaid by the said R. D. Robbins.

#### VIII

The said net taxable income for said calendar year 1918, so reported as aforesaid by the said R. D. Robbins, was derived fifty thousand eight hundred seventy-four and 09/100 dollars (\$50.874.09) as rents and issues of real and personal property, all of which was the community property of said R. D. Robbins and his said wife, all of which had been acquired by said community before the year 1917. The said community property was wholly acquired by the said R. D. Robbins and his said wife after their marriage aforesaid and prior to the year 1917, and no part thereof was acquired by said husband and wife, or either of them, by gift, devise, or descent, and the said sum of fifty thousand eight hundred seventy-four and 09/100 dollars (\$50.874.09) was derived wholly from the rents and issues of the said community property. That in addition in the net taxable income for said calendar year 1918 so reported as aforesaid by said R. D. Robbins, was included the sum of seventeen thousand seven hundred forty-seven and 00/100 dollars (\$17.747.00) of moneys earned by and paid to said R. D. Robbins during and for said calendar year 1918 as salaries, fees, and commissions for services rendered during said calendar year.

If, for said calendar year 1918, instead of the said income being so reported and paid on as aforesaid, the same had been divided for income-tax purposes and the said husband and wife had each reported in separate returns one-half thereof, the amount of such income tax for said calendar year computed, assessed, collected, and payable on each of said separate returns would have been the

sum of four thousand two hundred ninety-one and 43/100 dollars (\$4,291.43), making a difference between the sum actually reported and paid as aforesaid, namely, eleven thousand and seventy-nine and 46/100 dollars (\$11,079.46), and the said sum of four thousand two hundred ninety-one and 43/100 dollars (\$4,-291.43), thus attributable to separate return by said husband, of six thousand seven hundred eighty-eight and 03/100 dollars (\$6,788.03), the amount of the claim and refund for which these plaintiffs, in their capacity as executors of the last will and testament of said R. D. Robbins, are making claim against the defendant and bringing this action.

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#### IX

Thereafter, these plaintiffs, in their capacity as such executors aforesaid, duly made and filed demand to and with the Commissioner of Internal Revenue of the United States of America for the refund of said sum of six thousand seven hundred eighty-eight and 03/100 dollars (\$6,788.03) upon the ground set forth in such demand, that said last-mentioned sum was erroneously collected by the defendant, in the manner aforesaid, from said R. D. Robbins, in that the income and profits tax return of the said R. D. Robbins for the year 1918 was computed without reference to the community interest of the wife therein.

X

No part of said amount of six thousand seven hundred eighty-eight and 03/100 dollars (\$6,788.03) has been refunded or repaid by the defendant; said claim for refund has never been acted upon by the said Commissioner of Internal Revenue, and more than six months had elapsed prior to the commencement of this action after the said claim for refund was made and filed, as aforesaid, to and with said Commissioner of Internal Revenue.

Said executors, in their capacity as such, are the sole owners of the claim sued upon here, and no assignment or transfer of the same, or any part thereof, or of any interest therein, has been made; no action upon said claim, other than as herein set forth, has been taken in Congress, or by any of the departments of the Government, or in any court, other than the complaint filed in this court.

CONCLUSION OF LAW

Upon the foregoing findings of fact the court decides as a conclusion of law that the plaintiffs are entitled to recover the sum of six thousand seven hundred eighty-eight and 03/100 dollars (\$6,788.03), with legal interest from March 15, 1919.

In United States District Court

Opinion .

(Filed April 29, 1925)

Partridge, J. This is an action to recover the sum of \$6,788.03 income tax paid by R. D. Robbins for the year 1918. Admittedly, however, it is presented here as a test case, in order that appeal may be had directly to the Supreme Court; and it is said that if the suit goes against the Government the Treasury will be compelled to refund to citizens of the State of California a sum in excess of \$77,000,000.00.

R. D. Robbins and Sadie M. Robbins were married in 1871, and continued as husband and wife until his death in 1919. During those years a large fortune was accumulated. In 1918 Mr. and Mrs. Robbins attempted to file returns, each for one-half of the income of the property thus jointly accumulated. The collector refused to accept these returns and insisted that the tax be assessed as if the income all belonged to the husband. Accordingly, the amount of tax paid was \$11,079.46; whereas if each had made a separate return Mr. Robbins would have been compelled to pay only \$4,291.43.

The case is submitted upon an agreed statement of facts, and it is conceded that the entire income was from community property, and from earnings of the husband. The problem thus squarely presented is: Should community income in the State of California be taxed to the husband alone, or is it taxable one-half to each the

husband and wife?

The Treasury has rightly refused to answer this question, because it has before it conflicting opinions of its legal advisers, and because of the frequent expressions of the Supreme Court of California, declaring that the wife's interest in the community property is "a mere expectancy." Nor is it surprising that the law department of the Government should find itself in doubt, because—

1. The Supreme Court of the United States has declared that the

wife has a real interest.

2. The courts of last resort of all the States execept California have announced the same doctrine.

3. California alone has named that interest a mere expectancy, like that of an heir.

I think, however, that the differences are of form and not of

substance. At the outset, this much is apparent:

28 1. The Legislature of California, following the behest of the constitution of 1849, has, building upon the Spanish-Mexican system, continually extended and broadened the rights of

the woman in community property.

2. The Supreme Court of California, however much it may have deemed itself constrained by precedent to label the wife's interest, has never denied her that interest, but on the contrary has consistently fortified it when attacked, and granted it when questioned, in all substantial particulars.

3. There is no difference in substance between the views of the Supreme Court of California and the other States having the com-

munity system.

The question first came before the Treasury in 1920 with regard to Texas. On the 24th of August of that year Attorney General Palmer rendered an opinion, in which he held that in Texas the earnings of husband and wife are community property, and hence each could make a return of one-half thereof. In accordance with that opinion the Treasury issued its order (T. D. 3071) permitting returns to be made in this manner. On February 26, 1921, Attorney

General Palmer extended this doctrine to Washington, Arizona, Idaho, New Mexico, Louisiana, and Nevada, but specifically ruled against its application to California. Upon this the Treasury (T. D. 3138) accepted returns from husband and wife from all States except California, the ruling being placed upon the ground "that in all of the community property States except California, their own courts have held that the wife has, during the existence of the marriage relation, a vested interest in one-half of the community property." At the time this ruling was made this court (through Judge Rudkin, then district judge, and now in the Court of Appeals), had held that the wife's share of the community property was not subject to the estate tax. Blum v. Wardell, 270 Fed. 309.

After the issuance of T. D. 3138, the Court of Appeals for this circuit affirmed the decision of Judge Rudkin. Wardell v. Blum,

276 Fed. 226.

The Government filed a petition in the Supreme Court for certiorari, which petition was denied March 6, 1922. 258 U.S. 617.

After certiorari was denied in Wardell v. Blum, the Government moved the Supreme Court to revoke or recall its order, upon the ground that there was pending in the California courts a case which might dispose of the question. That was Roberts v. Wehmeyer, which had been decided by the District Court of Appeal of California November 21, 1921, and which was then pending in the State Supreme Court on rehearing. This case was decided by the California Supreme Court September 13, 1923. Roberts v.

Wehmeyer, 191 Cal. 601.

It was evidently deemed by the Government, however, that there was nothing in Roberts v. Wehmeyer which affected the decision in Wardell v. Blum, and accordingly the Solicitor General consented that the motion to revoke the order denying certiorari should be denied. After Wardell v. Blum thus became final, and on March 8, 1924, Attorney General Daugherty rendered an opinion, holding in effect that the same rule should be applied in California as in other community property States. The Treasury (T. D. 3568), in accordance with this opinion, put this State in the same category as the others. However, on May 27, 1924, Attorney General Stone withdrew the opinion of Mr. Daugherty for further consideration. On the 9th of October Judge Stone gave his opinion, and on February 7, 1925, the Treasury published T. D. 3670, applying the rule in the matter of estate taxes, but denying its application to income.

In the opinion of Judge Stone, it is noteworthy that he calls attention to the fact that in 1921, and again in 1924, the Treasury presented bills to Congress on this subject. His language is as

follows:

"While the act of 1921 was under consideration I am informed that officials of the Treasury attempted to have a provision inserted

making community property a part of the gross estate. The Ways and Means Committee refused to accept this proposed amendment. In the bill which was prepared in the Treasury Department, and which as amended became the act of 1924, there was a provision requiring so-called joint income of husband and wife under the community property law of California to be re-

was a provision requiring so-called joint income of husband and wife under the community property law of California to be returned, for purposes of taxation, as a single income of the husband. "After hearings before the Ways and Means Committee and the

"After hearings before the Ways and Means Committee and the submission of extensive briefs in opposition to the proposal, the committee struck from the bill the provision for taxing community income as single income, and the bill as enacted did not set aside or modify the application of the legal rule laid down in Blum v. Wardell. Notwithstanding the fact that there have been two general revisions of the revenue act and the question involved in the decision of Blum v. Wardell has been distinctly presented to the legislative branch of the Government, the principle of that decision has been left undisturbed by Congress."

It is also apparent that neither Mr. Daugherty nor Judge Stone considered that there was any settled principle in California by which the matter could be determined. Mr. Daugherty said: "In fact, I am of the opinion that no established rule can be gathered from the decided cases in that State." The view of Judge Stone is

as follows:

"The confusion in the decisions of the California courts has undoubtedly arisen from the fact that the courts have been attempting, in their opinions, to apply the terminology of the common law to community property, which embodies a legal concept wholly foreign to the common law, and to which the terminology of the common law can not be applied with accuracy and precision. In most

of the California decisions in which it was asserted that the right of the wife is a mere expectancy or right of inheritance, the same result could have been reached if the court had rested its decision upon the view that the wife had a vested interest in the community property subject to a power of disposition vested in the husband. (See Spreckels v. Spreckels, 116 Cal. 339; Estate of Wickersham, 138 Cal. 355; Dargie v. Patterson, 176 Cal. 714.) Whereas in other cases holding that the wife's interest in the community is a vested interest it seems to be necessary to describe the legal relationship of the husband to the wife's interest as a power of disposition in order to justify the decisions actually rendered. (See Estate of Brix, 181 Cal. 667; Taylor v. Taylor, 218 Pac. 757.) This, however, only suggests that a common law term may be resorted to to describe the incidents of community property in some aspects, but be wholly inappropriate to describe them for other purposes."

California was carved out of territory which had but lately been a part of Mexico; that is, Spanish in language, customs, and laws. It is probable that in 1849 the vast majority of the land was owned by people of Spanish ancestry and held by Spanish or Mexican title.

The influence of the language survives in the names of many of our cities—San Francisco, Los Angeles, San Jose, Monterey. It was perhaps the most typically Spanish of any part of American territory. When it came to framing a constitution, however, the tide of immigration had brought in many lawyers from the common law States, men of character, ability, and learning. These men largely preponderated in the convention which was assembled to frame a

constitution. Among the clauses ably and eloquently debated was the one relating to the property rights of married women.

The common law doctrine was most brilliantly presented; but, on the other hand, there were not wanting men who contended that inasmuch as the "Californians"—that is, the Spanish-Mexican inhabitants—had lived under the law which gives the wife more extensive power over property it was right in practice, as well as theoretically just and wise, to adopt that system. The latter views prevailed, and the following clause became a part of the constitution under which California was admitted as a State and became a part of the Union:

"All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterward by gift, devise, or descent, shall be her separate property, and laws shall be passed more clearly defining the rights of the wife in relation as well to her separate property as to that held in common with her husband. Laws shall also be passed providing for the registration of the wife's

separate property."

It is evident, therefore, that:

1. The theory of the common law as to the status of the wife with reference to property was deliberately rejected.

2. The theory of the Spanish law was quite as deliberately pre-

ferred and adopted.

3. The system was adopted in the light of the only body of legislation and jurisprudence which acknowledged it, namely, the Spanish.<sup>1</sup>

4. California was admitted to the Union upon the basis of a charter of fundamental law with provisions as to the rights of married women different from the common law rules then pre-

vailing in the other members of that Union.

The Supreme Court of California, early and late, has consistently recognized that the law of this State must be interpreted in the light of the Spanish law. The legislature, in obedience to the constitutional mandate, immediately enacted statutes defining the rights of husband and wife, both in the separate property of each, and the community property. Stat. 1850, page 254.

The Supreme Court, in Panaud v. Jones, 1 Cal. 513, says that "the law respecting the property of husband and wife in California has

<sup>&</sup>lt;sup>4</sup> FOOTNOTE: This, of course, ignores the fact that the Code Napoleon had changed the law of France by adopting a community system. If this fact was known to any of those who participated in the debates in the constitutional convention, no allusion was made to it.

undergone but little change in consequence of the passage of the act of the 17th of April, 1850;" and, after quoting certain sections of that act, declares it to be a "correct exposition of the Spanish law respecting the property of husband and wife." In Packard v. Arel-

lanes, 17 Cal. 531, the Supreme Court said:

"Our whole system by which the rights of property between husband and wife are regulated and determined is borrowed from the civil and Spanish law, and we must look to these sources for the reasons which induced its adoption and the rules and principles which govern its operation and effect. The relation of husband and wife is regarded by the civil law as a species of partnership, the property of which, like that of any other partnership, is primarily liable for the payment of its debts. 'The law,' says Schmidt, in his work on the civil law of Spain and Mexico, 'recognizes a partnership between the husband and wife as to the property acquired during marriage.'"

In Spreckels v. Spreckles, 116 Cal. 347, it is said that the system of community property was inherited from Spain. In Estate of

Moffitt, 153 Cal. 363, the court said:

"The Spanish-Mexican civil law was, of course, the law in force in California at the time of its cession by Mexico to the United States, and it was the design of the constitution of 1849 to preserve, so far as might be, to the wives of the inhabitants of the new State (most of whom were at that time former citizens of Spain or Mexico) the rights to the community property which they had enjoyed under the Mexican rule."

It is then thoroughly established that the community system came from Spain, through Mexico, and that this system in its fundamental aspect is the Spanish system. The word fundamental is used advisedly, because, of course, there have been statutory

changes in detail.

The case was argued by the Government as if there was nothing real in the wife's right until she should cease to be a wife. It was boldly stated, in effect, that the difference between her right and the right of dower was merely one of name and degree. In the opinion of this court the distinction forms the fundamental of the system, and that fundamental may be thus expressed: The wife's interest in the acquests of her husband is a genuine estate in that the money or property acquired becomes a fund out of which she is entitled to support, and in the accumulation of which she had a genuine interest, and the undue dissipation of which she has the power to prevent.

The inquiry as to whether or not that is a correct statement

therefore depends upon these considerations:

1. At the time of the adoption of the constitution of 1849 was

that the Spanish law?

2. Is there any difference between the statutes of this State and those of the States where the Government has conceded?

3. Can it be said that the express declaration of the law of California, that the community is one of the interests in property, and the system long recognized and adopted means nothing more than that it is an interest which does not commence until the community ends by the death of the husband or a decree of divorce?

4. In view of the decisions of the Supreme Court of the United States and the Circuit Court of Appeals, is this court bound by the

language of the Supreme Court of California.

1. Community property seems to have been unknown to the civil as well as to the common law. Some cases, indeed, seem to say without much consideration that it comes from the civil and Spanish law. I think, however, that the authors of those opinions have been misled by the fact that it was incorporated into the Code Napoleon and perhaps by this road found its way into Louisiana. Nothing could be clearer, at any rate, than that it did not exist in France prior to the Code Napoleon. It seems almost equally clear that it found its way into Spain from sources far north of east, from the Visigoths and not from Rome, a product Germanic and not Italian, of Euric or Tolosa and not the Cæsars. It appears first codified (so far as I know) in the Fuero Juzgo, of which Walton in his work on "Civil Law in Spain" says:

"The latter remarkable and original code, the Fuero Juzgo, had for its basis a multitude of institutions purely Germanic, such as the property of the conjugal community (gananciales) and advantages (mejoras), which even to-day are of much more importance in

Spanish civil legislation."

What that law really was, it seems to me, is best stated in the book by Felipe Sanchez Roman, tomo quinto (2nd ed.), vol. 1, page 339,

as follows:

"The property of the conjugal community belongs, while it exists, and afterwards individually 'to each of the spouses by halves

\* \* from which the ancient experts deduce that the disdistinction of dominion in habitu which the wife has and the dominion in actu which the husband has in the ganancial property is because one was proprietor without administration and the other proprietor with it, etc.'"

That this view of it prevailed for hundreds of years in Spain and was carried into Mexico there can be no doubt. In Spain as late as 1898 the supreme court at Madrid (Sentencia 28 Enero, 1896; Gac.

26, Febrero p. 135) uses this language:

"Considerando, por ultimo, que no prevalaciendo el recurso por los fundamentos relativos a la prueba, no pueda resultar violada por el fallo lay ley 4, tit. 4 lib. 10 de la Nov. Recop., en la que se establece que los bienes que han marido y mujer son de ambos por medio, salvo los que probase cada uno que son suyos apardamente."

In the Novisima Sala Mexicana occurs the following language:

"\* \* El segundo de segundo de que se ocupa todo el titulo 9
del libro 5 de la Recopilacion, o sea el 4 del libro 10 de la Novisima,

y que no conocio el derecho romano, es la adquisicion para ambos conjuges por mitad de lo que cada uno ganare durante el matrimonio; de modo que todos los bienes que tuvieren el marido y la mujer, son de ambos por mitad, menos aquellos que alguno de los dos probare

que le pertenecen separadamente."

The latter part, which may be translated, "so that all of the properties which the husband and wife may have belong to both equally, excepting those which either of the two may prove belongs to him separately," seems to me to have been the law of Spain for fourteen hundred years, of Mexico since that fatal 5th of September, 1519, when Xicotencath hurled his naked warriors against the armor-clad

host of Cortes, and of California from the time of Father Serra.

2. The act of 1850 defined community property as "all property acquired after the marriage by either husband or wife, except such as may be acquired by gift, bequest, devise, or descent." (Stat. 1850, page 254.) This provision, whatever other changes may have occurred, has remained to the present day (Civil

Code, Sec. 162, 163, 164).

It is plain that in the very definition of community property, such as obtains in California, the earnings of both husband and wife would be community property, unless, as in the special case of the wife living separate and apart (Calif. Civil Code, Section 169), the wife's earnings were expressly excepted by statute from the general rule, and the decisions of the California courts hold accordingly (Washburn v. Washburn, 9 Cal. 475, Martin v. Southern Pacific Company, 130 Cal. 285, Fennell v. Drinkhouse, 131 Cal. 447). These general characteristics of community property, common to all the community-property States, including California, are recognized in the series of opinions on this subject issued from the Attorney General's office, as published in Treasury Decisions 3071, 3138, and 3569, and will appear from a comparison of the California statutes on the subject, above referred to, with the corresponding statutes of the other community-property States. In New Mexico and Nevada the statutes defining separate and community property are almost literal copies of the California statutes.

Now, in what manner do the statutes of the other community-property States differ? The variations fall under several heads:

(a) In some States the income from separate property becomes community property. Thus, in Idaho, the rents and profits of the separate property of husband and wife are community property. (Section 4659 Compiled Stat. Idaho.) So, in Louisiana, the income of separate property becomes community property (section 2402 Rev. Civil Code Louisiana), and in Texas income from sepa-

rate property is community property, except that, since 1917, rents from separate real property are the separate property of the owner of the land (section 4621, Rev. Stats. Texas; Burr v. Simpson, 117 S. W. 1040, Hayden v. McMillan, 23 S. W. 430). In the other four community-property States income from

separate property, as in California, is not community property. (Section 3438, Civil Code Arizona; sections 2757, 2758, New Mexico Code of 1915; section 2155, Rev. Laws of Nevada; sections 1424.

1432, Gen. Stats. Washington.)

So it will be noted that in this particular those States which differ from California are less favorable to the wife in that the income from her separate estate belongs to the community and more favorable to her because the income from the husband's separate estate becomes community property.

(b) In California the wife's earnings (not living separate and

apart from her husband) become community property.

In Arizona (section 3850, Civil Code of Arizona), as in California (section 169, Civil Code of California), the earnings of a wife living separate and apart from her husband are her separate property. In Texas the personal earnings of the wife are under the control, management, and disposition of the wife alone, and they are not subject to the payment of debts contracted by the husband (sections 4621, 4622, Rev. Stats. Texas). And in Washington the wages of her personal labor are the separate property of the wife (section 1428, General Statutes of Washington). But otherwise than as above noted the earnings of the husband and of the wife in community-property States are equally community property, though in Nevada the wife has the disposition of her earnings if used for the care and maintenance of the family (section 2160, Rev. Laws of Nevada), and in Idaho the wife, since 1915, has had the management and control of her personal earnings (sections 4666, 4667, Comp. Stats. Idaho, 1919).

In Idaho (section 4666, Comp. Stats. Idaho, 1919), where income from the wife's separate property is made community property.

and where her earnings are community property, these particular forms of community income do not come under the 39 general dominion of the husband. In Louisiana, on the other hand, the oldest of the community property States, where income from the wife's separate estate and where her earnings are also community income, the husband has the management, control, and disposition thereof (sect. 2404, Revised Civil Code of La.).

(c) I come now to the vital question of the husband's control over the community property. Inasmuch as practically the whole bar of the eight community-property States (as well as most of the citizens thereof) are concerned in this litigation, it seems worth

while to quote them:

STATUTES AFFECTING HUSBAND'S DOMINION OVER COMMUNITY PERSONALITY

#### ARIZONA

"All property acquired by either husband or wife, during the marriage, except that which is acquired by gift, devise, or descent, or earned by the wife and her minor children while she has lived or may live separate and apart from her husband, shall be deemed the common property of the husband and wife, and during the coverture personal property may be disposed of by the husband only; but husband and wife must join in all deeds and mortgages affecting real estate, except unpatented mining claims, which may be conveyed by the husband or wife only, as provided by the laws of this State relating to conveyances; provided that either husband or wife may convey or mortgage separate property without the other joining in such conveyance or mortgage (section 3850, Civil Code, Arizona)."

#### CALIFORNIA

"The husband shall have the entire management and control of the common property with the like absolute power of disposition as of his own separate estate (section 9, Calif. Stats. 1850, p. 254).

"The husband has the management and control of the community property with the like absolute power of disposition (other than testamentary) as he has of his separate property (Calif. Civil Code.

section 172, as enacted March 21st, 1872).

"The husband has the management and control of the community property with the like absolute power of disposition (other than testamentary) as he has of his separate estate; provided, however, that he can not make a gift of such community property, or convey the same without a valuable consideration, unless the wife, in writing, consents thereto. (Calif. Civil Code, section 172, as amended,

Stats, 1891, p. 425.)

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IDAHO

"The husband has the management and control of the community property, except the earnings of the wife for the personal services and the rents and profits of her separate estate. But he can not sell, convey, or encumber the community real estate unless the wife join with him in executing and acknowledging the deed or other instrument of conveyance, by which the real estate is sold, conveyed, or encumbered. (Section 4666, Comp. Stats. Idaho, 1919.)

"The wife has the management and control of the earnings for her personal services, and the rents and profits of her separate estate.

(Sect. 4667, Ibid.)

#### LOUISIANA

"The husband is the head and master of the partnership or community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title, without the consent and permission of his wife. He can make no conveyance inter vivos, by a gratuitous title, of the immovables of the community, nor of the whole or of a quota of the movables, unless it be for the children of the marriage. Nevertheless he may dispose of the movable effects by a gratuitous and particular title, to the benefit of all persons. But, if it should be proved that the husband

has sold the common property, or otherwise disposed of the same by fraud, to injure his wife, she may have her action against the heirs of her husband, in support of her claim in one-half of the property, on her satisfactorily proving the fraud. (Section 2404, Revised Civil Code of La.)

#### NEVADA

"The husband has the entire management and control of the community property, with the like absolute power of disposition thereof, except as hereinafter provided, as of his own separate estate; provided that no deed of conveyance, or mortgage, or a homestead as now defined by law, regardless of whether a declaration thereof has been filed or not, shall be valid for any purpose whatever, unless both the husband and wife execute and acknowledge the same as now provided by law for the conveyance of real estate. (Section 2160, Rev. Laws of Nevada, 1912.)

#### NEW MEXICO

"The husband has the management and control of the community property, with the like absolute power of disposition, other than testamentary, as he has of his separate estate; provided, however, that he can not make a gift of such community property, or convey the same without a valuable consideration, unless the wife, in writing, consent thereto, and provided, also that no sale, conveyance, or encumbrance of the homestead, which is then and there being occupied and used as a home by the husband and wife, or which has been

declared to be such by a written instrument signed and ac-41 knowledged by the husband and wife and recorded in the county clerk's office of the county, and furniture, furnishings, and fittings of the home, or of the clothing and wearing apparel of the wife and minor children, which is community property, shall be made without the written consent of the wife. (Section 2766, New

Mexico Code, as in force in 1907.)

"The husband has the management and control of the personal property of the community, and during coverture the husband shall have the sole power of disposition of the personal property of the community, other than testamentary, as he has of his separate estate; but the husband and wife must join in all deeds and mortgages affecting real estate: provided, that either husband or wife may convey or mortgage separate property without the other joining in such conveyance or mortgage; and provided further, that any transfer or conveyance attempted to be made of the real property of the community by either husband or wife alone shall be void and of no effect. (Section 2766, New Mexico Code of 1915.)

#### TEXAS

"All property acquired by either the husband or the wife during marriage, except that which is the separate property of either one or the other, shall be deemed the common property of the husband and wife, and during coverture may be disposed of by the husband only; provided, however, that personal earnings of the wife, the rents from the wife's real estate, the interest on bonds and notes belonging to her, and dividends on stocks owned by her shall be under the control, management, and disposition of the wife alone. subject to the provisions of 4621 as hereinabove written; and further provided, that any funds on deposit in any bank or banking institution, whether in the name of the husband or wife, shall be presumed to be the separate property of the party in whose name they stand, regardless of who made the deposit, and unless said bank or banking institution has provided to the contrary it shall be governed accordingly in honoring checks and orders against such account. 4622, Revised Stats. of Tex.)

#### WASHINGTON

"Property, not acquired or owned as prescribed in the next two preceding sections, acquired after marriage by either husband or wife, or both, is community property. The husband shall have the management and control of community personal property, with a like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof. (Sect. 5917, Gen. Stats. Wash.)"

From these statutes it is impossible to find any essential difference between the statutes of California and the other States upon this vital question of the husband's control over the community property.

In California, from 1850 to 1891, the husband had the management and control of the community property, with the like absolute power of disposition (other than testamentary) as he had of his separate estate. (Calif. Stats. 1850, p. 254; Stats. 1861, p. 310; Stats. 1863-4, p. 363; Sect. 172, Calif. Civil Code.) California courts prior to 1891 held that the husband, however, could not voluntarily alienate the community property for the mere purpose of divesting the wife of her claims to it. (Smith v. Smith, 12 Cal. 216, 226; De Godey v. Godey, 39 Cal. 157, 164.) In 1891 began a series of statutory changes in California designed to protect more completely the interest of the wife during coverture in the community property.

Since 1891 (Calif. Statutes, 1891, p. 425) the husband has been without power to make a gift of the community property or to convey the same without a valuable consideration, unless the wife in writing consented thereto. In Dargie v. Patterson, 176 Cal. 714, the

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Supreme Court recognized that this veto on gifts was conferred upon the wife "as a means of protecting her interest in the community

property" (p. 718).

This interest of the wife in the community property thus protected is not a common law tenancy by entirety, as such an interest in property is not recognized in California. (Swan v. Walden, 156 Cal. 195.) The interest so protected, as held in Dargie v. Patterson, supra, "goes to every part and parcel of the community estate" (p. 720). It is a right, under this decision, to an "undivided one-half interest in every item of property" (p. 720).

Since 1901 (Calif. Stats. 1901, p. 598) the husband has been without power to convey or encumber the furniture, furnishings, and fittings of the home, or the clothing and wearing apparel of the wife or minor children, which was community property, even for a valuable consideration, without the written consent of the wife.

Since 1913 (Calif. Stats. 1913, p. 537) no assignment of the wages or salary of a married person is valid unless the written consent of the husband or wife of the person making the assignment is attached thereto. Since 1917 (Calif. Stats. 1917, p. 829) the wife must join with the husband in executing any instrument by which community real property or any interest therein is leased for a longer period than one year or is sold, conveyed, or encumbered. Thus, in California, since 1891, the dominion of the husband over the community property during the marriage has been increasingly limited.

Since 1891 the dominion of the husband in California over all community property during coverture has been no broader than it is in some of the other community-property States, and it has been growing less and less broad, and ever since and subsequent to 1917 it is less broad than in any other community-property State.

Prior to 1891 in California a gift of community property by a husband to his mother, when reasonable in amount, was valid in the absence of a fraudulent intent to defeat the claims of the wife in community property. (Lord v. Hough, 43 Cal. 581.) On the same principle a gift of such property to children in California prior to 1891 was valid under like circumstances. (Jacobs v. All Persons, 12 Cal. App. 163; 128 Pac. 1009.) So in Nevada a gift of community property by the husband to trustees for the use of the people of a certain city was valid without the wife's consent thereto where the property so given in proportion to the whole estate was not unreasonable or indicative of a fraudulent intent to defeat the wife's claims. (Nixon v. Brown, 214 Pac. 524.) But since 1891 such gifts in California have been barred except where the wife consented thereto in writing. Since 1891 the husband in California can not make a valid gift of community property, real or personal, for the establishment of the children of the marriage unless the wife consents thereto in writing, but without such consent the husband in Louisians

can lawfully make such a gift of community personalty for such a purpose. (Sect. 2404, Revised Civil Code of La.)

In every one of the community property States the husband, during the marriage, is given the management of the community real property (section 3850, Civil Code of Arizona; section 172a, Civil Code of California; section 4666, Compiles Statutes of Idaho, 1919; section 2404, Revised Civil Code of Louisiana; section 2160, Revised laws of Nevada; section 2766, New Mexico Code of 1915; section 4622, Revised Statutes of Texas; section 5918, General Statutes of Washington). But in Nevada (section 2160, Revised Laws of Nevada), Louisiana (section 2404, Revised Civil Code of Louisiana). and Texas (section 4622, Revised Statutes of Texas), the husband may convey the community real property for a valuable consideration, without the consent or signature of the wife. In Washington the husband has the management and control of the community real property, but he can not sell, convey, or encumber it unless the wife joins with him in executing the deed or other instrument of convevance (section 1434, Gen. Stat. Wash.) In Arizona (sect. 3850, Civil Code of Ariz.), in Idaho (section 4666, Comp. Stats. Idaho, 1919) and New Mexico (sect. 2766, New Mexico Code of 1915) the husband can not sell or encumber community real property without the wife's written consent. In California, however, the husband since 1891 has been without power to make a gift of community real property or to convey the same without a valuable consideration unless the wife consented thereto in writing, and since 1917, under section 172a of the Civil Code of California, added to the code in 1917, the husband can not convey, sell, or encumber the real property, or lease it for more than one year, without the consent and signature of the wife. Thus from 1891 to 1917 his right to convey community real property without the wife's consent was no other than that possessed by husbands in Nevada, Louisiana, and Texas, or in New Mexico before 1915. Since 1917 in California alone

is the wife's consent required to leases of community real property for more than one year. Thus from 1891 to 1917, in California, the husband's dominion over community real property during the marriage was no broader than in three other community property States and since 1917 it has not been as broad as in every other community property State. Prior to 1891, about the only practical power the husband had over community real property in California was the power to make a gift or transfer thereof that was not in fraud of the wife's claims.

As regards testamentary power over the community property, in Arizona (section 1100, Civil Code of Arizona), in Idaho (section 7803, Compiled Statutes of Idaho, 1919), in Louisiana (sections 915 and 916, Revised Civil Code of Louisiana), and in Washington (section 1342, General Statutes of Washington) the wife has the right to make testamentary disposition of one-half of the community property, in case she dies before her husband. The wife now has such a right in California also, although only since the 1923 amendment to section 1401 of the Civil Code (Statutes 1923, p. 29). How-

ever, in Nevada (section 2164, Revised Laws of Nevada, and in New Mexico (section 1840, New Mexico Code of 1915) the wife has no testamentary power over the community property, in case she dies before her husband, which was the law in California until the 1923 amendment.<sup>2</sup>

(D) In Idaho, Nevada, and New Mexico the courts have called the wife's interest, in effect, a technical legal estate. Kohny v. Dunbar, 121 Pac. 544. In re Williams, 40 Nev., 241; 161 Pac. 741.

Beals v. Ares, 185 Pac. 780.

Yet, even in those States, her interest does not descend to her heirs if she dies without making a will. Sec. 7803 Comp. St. Idaho: Sec. 2164 Rev. St. Nevada; Sec. 1840 New Mexico Code.

(E) Nor can the wife in those seven other community property
States, where her interest in community property has been
characterized as a technical estate, alienate that interest dur-

ing coverture, when acting alone. The dominion over the community property and the whole of it is either vested in the husband alone, or, in the case of real property, and, in some States, in the case of some special personal property, too, in the husband and the wife. These are the statutory provisions on the subject and the court decisions are in accord. The wife in Texas is without power, alone, to transfer the community property or her half interest therein (Lasater v. Jamison, Tex. C. A. 203 S. W. 1151). The wife in Nevada can not dispose of community property or make any contract that binds it (Travers v. Barrett, 30 Nev. 402, 127 Pac. 126). Nor can the wife in Washington dispose of community property or her interest therein (McAlpine v. Kohler & Chase, 96 Wash. 146, 164 Pac. 755; Litzell v. Hart, 96 Wash. 471, 165 Pac. 393). In Idaho the wife can not sell or encumber the community property (Kohny v. Dunbar, 121 Pac. 544). In Louisiana—

"The husband is the head of the community and has by law the right to administer the common property, and the wife has not the right to alienate such property, even for a common debt." (Hart v.

Gottwald, 15 La. Ann. 13.)

So that the possession of a technical estate in the community property gives to the wife no more power of alienation than she could claim if her interest in the community property had been likened to

the expectancy of an heir.

(F) In California, on the dissolution of the marriage by divorce, the wife receives her half of the community property in every case except where the divorce is decreed on the ground of extreme cruelty or adultery, in which cases the community property may be assigned to the spouses in such proportions as the court, from all the facts of the case and the condition of the parties, may deem just (California Civil Code, section 146). In this particular the law of California

<sup>&</sup>lt;sup>2</sup> Note 2: Upon this part of the opinion the court has been spared much labor by using the excellent compilation of Mr. Allen Wright, appearing as Amicus Curiae for the Chamber of Commerce of San Francisco.

is like the law of Nevada (section 2166, Revised Laws of Nevada).

Under the Spanish law the wife sacrificed her interest in
the community property by adultery (Loewy on Spanish
Community of Acquests, 1 Calif. Law Review, pp. 32, 43).

In New Mexico the community property is divided between the spouses on divorce or permanent separation (sections 2744 and 2781, New Mexico Code, 1915). In Arizona and Washington on divorce the court may divide the community property as it sees fit. (Sect. 3116, Rev. Stats. Ariz. 1901; sect. 989, Comp. Stats. Wash. 1922, Miller v. Miller, 38 Wash. 605, 80 Pac. 816.) Without pursuing this subject further, it is clear, therefore, that there is no uniform rule in the community property States governing the disposition of community property on divorce.

(G) On the death of the husband in California the wife shares as fully in the community property as in Arizona, Louisiana, New

Mexico, or Washington.

The wife in California, even though she took her half of the community property before 1917 as an heir to the husband, received as large a share of the community property as the wife would take as a survivor or by purchase in New Mexico, Arizona, Louisiana, or Washington. The statutes of New Mexico (sect. 1841, New Mexico Code of 1915) provide that on the dissolution of the community by the death of the husband the entire community property is subject

bis debts, the family allowance, and the charges and expenses of administration. It is the half of the residuum of the community property which goes to the wife in New Mexico on the death of the husband. In California the wife, even though taking like an heir to her husband, gets as much. A like rule applies in Louisiana, Washington, and Arizona.

In Louisiana the administration of the husband's estate includes the wife's interest in the community, and the commissions of the administrator or executor on the community property are fixed to the full extent of that property and not upon the deceased husband's

interest alone.

Bertrand's Succession, 123 La., 784, 49 So. 524.

The same rule applies in Washington.

Ritzville First Nat. Bank v. Cunningham, 72 Wash. 532, 130 Pac. 1148. Lawrence v. Bellingham Bay, etc., Co., 4 Wash. 664, 20 Pac.

1099. Ryan v. Ferguson, 3 Wash. 356, 28 Pac. 910.

And in Arizona, in administering the estate of a deceased husband, the court properly assumes administration of the whole of the community estate to determine the amount of debts chargeable against it and to direct their payment out of community property, including the expenses of administration.

La Tourette v. La Tourette, 15 Ariz. 200, 137 Pac. 426.

The so-called expectancy of the wife in community property in California appears, therefore, to be fully as valuable and equally as protected as the so-called technical estate of the wives in community property in the other community-property States. At only one point might the distinction between an expectancy and a technical estate prove to have important consequences, and that is in the matter of State inheritance taxes. But here, since 1917, in California, even if the wife's interest in half of the community property was not a technical estate, it has at any rate been as free from State inheritance taxes as though it were a technical estate (Stats. 1917, p.

880; Stats. 1921, p. 1500; Stats. 1923, p. 694).

On the death of the wife, before 1923, the whole community property, without administration, belonged to the surviving husband in California, as it does in Nevada (section 2164, Rev. Laws, Nevada) and in New Mexico (sect. 1840, New Mexico Code, 1915). Since 1923 in California the statute has provided (Calif. Civil Code, sect. 1401) that on the death of the wife one-half of the community property belongs to the surviving husband and the other half goes to him, too, unless the wife makes testamentary disposition thereof to others. This is and has been the law in Idaho (sect. 7803, Comp. Stats. Idaho, 1919). In Texas, on the death of the wife one-half of the community property belongs to the husband and the

other half goes to him, too, unless she leaves children, in which case her children or their heirs take her half (section 2469, Rev. Stats., Texas). If the wife in Texas left grandchildren, but no children, the whole community estate in Texas would go to the husband (Cartwright v. Moore, 66 Tex. 55, 1 S. W. 263). In Arizona (section 1100, Civil Code, Ariz.), Louisiana (sects. 915 and 916, Revised Civil Code, La.), and Washington (sect. 1342, Gen. Stats. Wash.) on the death of the wife one-half of the community property belongs to the husband and the other half is subject to her testamentary disposition, and in the absence thereof goes to certain of her heirs, and in default thereof goes to the husband. As regards the testamentary capacity of the wife over her half of the community property and as regards the laws of succession to her half the different community property States vary as above shown. On the death of the wife the husband is now certain of acquiring all the community property only in the States of Nevada and New Mexico; in the other States, including California, he is sure of retaining one-half

3. The Government insists that the answer to the third question is found in the decisions of the Supreme Court of California. It is, indeed, upon the basis of those decisions that the Treasury has felt itself bound to refuse to citizens of California the relief accorded to the people of the other community property States. The

plaintiff answers:

First. That the decisions of the Supreme Court of California are so utterly inconsistent that it is impossible to find in them any

settled rule of property.

of the community property, but no more.

Second. That in all essential particulars those decisions do confirm to the wife all the interest and estate necessary to a solution

of the problem here, and all or more than she has according to the decisions of the courts of last resort of other States.

As to the first proposition, it seems to me that the inconsistency is more apparent than real. It is based upon words used—names given to things—rather than upon the real and substantial dispositions of those things. But if it be true that the language of the Supreme Court first used in Van Maren v. Johnson, 15 Cal. 308, that "the interest of the wife is a mere expectancy, like the interest which an heir may possess in the property of his ancestor," was intended as a real and substantial definition of her interest and not a mere form of words then there is a radical inconsistency, because that court has time and again granted and confirmed to her rights utterly and absolutely different from those of a mere heir at law.

The first case (after the very early cases) relied upon by the Government is Fallbrook Irrigation District v. Abila, 106 Cal. 355. The point involved there was whether or not within the meaning of the statute for the formation of irrigation districts a married woman was the "owner" of land. The court repeats the language of Van Maren v. Johnson, but adds: "Although it is, no doubt, more tangible than the mere expectancy of a general heir." It is significant also that the court in that case points out that there are certain kinds of qualified ownership as bailees, tenants for years, and others, after

which comes the real gist of the decision:

"On the other hand, when we consider the character and purpose of the Wright Act and the great importance which attaches under it to the execution of a valid petition many obvious reasons are suggested why the said words should not be taken in a limited or

qualified sense."

The next is Spreckels v. Spreckels, 116 Cal. 339. This case was decided in 1897, after the legislature had amended section 172 of the Civil Code, which read as follows: "The husband has the management and control of the community property, with the like power

of disposition (other than testamentary), as he has of his 51 separate estate," by adding these words: "Provided, however, That he can not make a gift of such community property or convey the same without a valuable consideration unless the wife in

writing consent thereto."

In the decisions, while the court does say that the best definition of the woman's interest is a "mere expectancy," the real judgment is placed upon the ground that the property which had been given away by Mr. Spreckels was acquired before the amendment of 1891. Moreover, as showing the difficulties in the minds of the learned justices, the following extracts may be quoted:

"There is no mode in which community property can be converted into his separate property. As to all the world, except the wife, there was prior to this amendment no distinction between the community estate and the separate estate of the husband." \* \*

\* \* "The first attempt shown by our reports of that kind is in Godey v. Godey, 39 Cal. 157. In that case it is said that, while no other technical term so well defines the wife's interest as the phrase 'a mere expectancy,' \* \* \* it is at the same time \* \* \* \* so vested in her that (the) husband can not deprive her of it by his will nor voluntarily alienate it for the mere purpose of divesting her of her claim to it. \* \* \* The husband's ownership of one-half of the community estate is, in a sense, conditional."

Moreover, the doctrine of Spreckels v. Spreckels, in so far as it can be construed to define the wife's interest, has been specifically repudiated by the Supreme Court of the United States and quite recently in effect by the Circuit Court of Appeals of this circuit. In Arnett v. Reade, 220 U. S. 311, there was a dissent by Mr. Justice

McKenna, based partly upon the Spreckels case, but in the

main opinion by Mr. Justice Holmes it is said:

"It is not necessary to go very deeply into the precise nature of the wife's interest during marriage. The discussion has fed the flame of juridical controversy for many years. The notion that the husband is the true owner is said to represent the tendency of the French customs. 2 Brissaud, Hist. du Droit Franc. 1699 n. 1. The notion may have been helped by the subjection of the woman to marital power; 6 Laferriere, Hist. du Droit Franc. 365; Schmidt. Civil Law of Spain and Mexico, arts. 40, 51; and in this country by confusion between the practical effect of the husband's power and its legal ground, if not by mistranslation of ambiguous words like dominio. See United States v. Castillero, 2 Black, 1, 227. However this may be, it is very plain that the wife has a greater interest than the mere possibility of an expectant heir. For it is conceded by the court below and everywhere, we believe, that in one way or another she has a remedy for an alienation made in fraud of her by her husband. Novisima Recopilacion, Book 10, Title 4, Law 5. Schmidt, Civil Law of Spain and Mexico, art. 51. Garrozi v. Dastas, 204 U. S. 64, 78. We should require more than a reference to Randall v. Krieger, 23 Wall. 137, as to the power of the legislature over an inchoate right of dower to make us believe that a law could put an end to her interest without compensation consistently with the Constitution of the United States."

In Wardell v. Blum, 276 Fed. 228, the Circuit Court of Appeals for this circuit holds that under Arnett v. Reade the wife's share does not come to her as an heir, irrespective of the provisions of the

statute of 1917. The language is as follows:

"It must not be forgotten that the sole question here is one of Federal inheritance tax and, even if the case was not controlled by the California statute of 1917 above referred to, applying to it the rule of law announced by the Supreme Court of the United States in the case of Arnett v. Reade, 220 U. S. 311, 320, 31 Sup. Ct. 425, 55 L. Ed. 477, 36 L. R. A. (N. S.) 1040, the result, it seems to us, must be the same. That court there said:

"'It is very plain that the wife has a greater interest than the

mere possibility of an expectant heir."

The next case cited in the brief is Estate of Moffitt, 153 Cal. 359. However, the precise question in that case (namely, whether upon the death of the husband the wife took as heir so as to subject her to inheritance tax) had been previously determined by the same court in In re Burdick, 112 Cal. 387. By In re Burdick was decided specifically upon the statutes as they stood at the time. "The estate of the wife in the community property," says the court, "is a creature of statute, and is, of course, just what the statute has made it," and the gist is in the following language:

"The codes are in pari materia and must be construed as one, This plain intent, that the title of the wife to one-half of the community property shall be administered as part of the estate of the husband, added to the continuous and uniform practice of near

half a century, must place this matter beyond all doubt.

"The suggestion that the husband takes from the wife her share of the community property upon her death by succession may seem inconsistent with the proposition that during her life she had no estate of any kind in the property. That she had no estate in the community property—vested or contingent—was held by this

court, when the law was that upon her death one-half of the community property was inherited by her next of kin. The

change was made by amendments which are codified in sections 1401 and 1402, and which merely change the succession. It was competent for the legislature to provide the mode in which the wife's expectancy should pass to the husband. It might have done this by creating a right by survivorship as an incident to the estate, but it has done this by providing for a succession. Since the wife could not encumber it or contract with reference to it, there can be no essential difference."

The estate of Moffitt, in effect, did no more than reaffirm the estate of Burdick. But in regard to these two cases the significant and outstanding fact is that the people of the State of California refused to accept their doctrine as just and fair to the wife. Speaking through the legislature they reversed and repudiated that doctrine by the enactment of a statute to the effect that the wife's share of the community property should not be subject to the inheritance tax. In oher words, they said in effect: If In re Burdick and Estate of Moffitt are the result of our statutes, then those statutes do not truly express the real rights of the wife in the community property, and we will change them so that they will speak truly. I can look upon this amendment in no other light than a deliberate choice between the views of the Burdick and Moffitt cases, and those of the same court in Beard v. Knox, 5 Cal. 256, where it was declared:

"The husband and wife, during coverture, are jointly seized of the property, with a half interest remaining over to the wife, subject only to the husband's disposal during their joint lives. This is a present, definite, and certain interest which becomes absolute at his death."

The next case relied upon by the Government is Spreckels v. Spreckels, 172 Cal. 778. The real gist of the decisions, however, is (1) that if, under the amendment of 1891, Mrs. Spreckels had an immediate right to bring an action to set aside a gift, that right was barred by the statute of limitations. (2) If this right did not accrue until after the death of her husband, she had ratified and confirmed it by the provisions of her will. The language of the opinion otherwise was in no way necessary to the decision.

Next, the Government relies upon Roberts v. Wehmeyer, 191 Cal. 601. This is the case which was pending at the time of the motion to revoke the order, denying certiorari in Wardell v. Blum. The plaintiff and her husband had acquired certain real property, paying therefor "community funds accumulated prior to the adoption of an amendment to the code of 1917, when 172-a was added, reading:

"The husband has the management and control of the community real property, but the wife must join with him in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, con-

veyed, or encumbered."

The real thing decided in the case was that, before this amendment, the husband had the power to convey property for a valuable consideration without the consent of his wife, and that the amendment could not operate against funds acquired before its enactment. The Supreme Court of California quotes the decision of Judge Rudkin (Blum v. Wardell, 270 Fed. 309), holding unqualifiedly that section 172-a recognizes in the wife a "valid, subsisting, vested interest and estate in the community property during the life of the husband," but is constrained to disagree with that jart of the decision of the Circuit Court of Appeals in Wardell v. Blum which relied upon Arnett v. Reade. The comment upon Judge Rudkin's opinion is as follows:

"We need express no opinion of the decision of the United States district court for, as we have already held, section 172a has no application to the property involved in the case at bar."

I feel certain, in view at least of the fact that the Supreme Court did not expressly dissent from Judge Judkin's view, that it truly expresses the intent of the legislature, as a part of the consistent policy to get away from the mere language of the Supreme Court and recognize in the wife a real, substantial, vested, and existing interest. For how can it be said that the law-makers would enact statutes under which the wife takes property, not as an heir but as survivor, and declaring that no part of that property could be sold unless she joined in the sale, unless, during the life of her husband, she had an existing interest in that property?

We come now to the cases which the plaintiff contends are in conflict with those cited by the Government. The language of Beard v.

Knox (supra) is as follows:

"The words 'with absolute power to dispose of 'ought not to be extended to a disposition by devise. The husband and wife, during coverture, are jointly seized of the property, with a half interest remaining over to the wife, subject only to the husband's disposal during their joint lives. This is a present, definite, and certain interest, which becomes absolute at his death, so that a disposition by devise, which can only at ach after death of the testator, can not affect it, for such a convevance can only operate after death, upon the very happening of which the law of this State determines the estate, and the widow becomes seized of one-half of the property."

Estate of Buchanan, 8 Cal. 507:

57 "The law of Mexico in force here until our statute took effect was the same so far as relates to the merits of this question. The property belonged to the community, and upon the death of the husband the widow took one-half. The husband had the power of disposition while living, but not by will, which could only take effect after his death. Schmidt's Civil Law of Spain and Mexico, 12, 14, arts. 43, 44, 51, 52; 1 Cal. 513; 5 Ibid. Ill. 257."

Meyer v. Kinzer, 12 Cal. 247:

"These provisions of the statute are borrowed from Spanish taw, and there is hardly any analogy between them and the doctrines of the common law in respect to the rights of property consequent upon marriage. The statute proceeds upon the theory that the marriage, in respect to property acquired during its existence, is a community of which each spouse is a member equally contributing by his or her industry to its prosperity, and possessing an equal right to succeed to the property after dissolution in case of surviving the To the community all acquisitions by either, whether made jointly or separately, belong. No form of transfer or mere intent of parties can overcome this positive rule of law. All property is common property except that owned previous to marriage or subsequently acquired in a particular way. The presumption, therefore, attending the possession of property by either is that it belongs to the community; exceptions to the rule must be proved."

Smith v. Smith, 12 Cal. 223:

"In Beard v. Knox (5 Cal. 252), this court held that the common property could not be disposed of by the husband by will so as to defeat the rights of the surviving wife; and the same doctrine is maintained in the matter of Bushanan's Estate (8 Cal. 507).

In the first case the court said: 'Our statute has done away with the common-law right of dower, and substituted in its place a half interest in the common property. This liberal provision was intended for the benefit of the wife, and the intention of so humane and beneficent a law should not be defeated by adopting a rule of construction which would leave the future maintenance of herself and family entirely at the caprice of the husband.""

In Scott v. Ward, 13 Cal. 469, the language quoted above from Beard v. Knox is repeated. In Payne v. Payne, 18 Cal. 301, Mr. Justice Field, who wrote the decision in Van Maren v. Johnson, has

this to say about Beard v. Knox:

"'The deceased' said the court, 'had no authority to dispose of but one-half of the property; this me might do to whomsoever he pleased." That case was decided in July, 1855, and the decision has never been questioned. It has furnished a rule under which property of vast amount and value has been distributed. We have no doubt of its correctness; and we only affirm and follow it, in holding, as we do in the present case, that the plaintiff took one undivided half of the common property in her own right by virtue of the community existing between herself and husband; and that the remaining half was subject to his testamentary disposition."

So Morrison v. Bowman, 29 Cal. 348, quotes with approval the language in Payne v. Payne, and repeated from Beard v. Knox.

In Peck v. Brummagun, 31 Cal. 446, the Supreme Court gives its views of the rationale of Smith v. Smith in the following

language:

59 "The statute confers upon him the like absolute power of disposition of the common property as of his own separate estate; but there is this necessary restriction upon his power, that he can not make a voluntary disposition with the view of defrauding or defeating the claims of the wife, as held in Smith v. Smith, 12 Cal. 216. This springs from the relation of the parties and their title to the property, both spouses being jointly entitled to the property, though the husband has the entire management and control of it and can pass the title in his name alone."

In Galland v. Galland, 38 Cal. 265, in holding that the wife had the right to compel support from the community property when she had been driven from the home, the court declared that the wife had "a joint and equal interest with the husband in all property ac-

quired during the marriage."

In De Godey v. De Godey, 39 Cal. 157, it is said:

"It (community property) accrued to her, as having been acquired in part by her own efforts, before the decree of divorce was rendered; that decree as rendered did not deprive her of it. The effect of the decree, acting upon her personal status, was to remove from her the disability, theretofore, as we have said, almost total, to sue concerning it, or to interfere in anywise in its control. Under the operation of that decree, too, the appellant, ceasing to be 'husband,' was no longer the head of the community, which had itself ceased to exist, and, as a consequence, he lost the exclusive control and the somewhat absolute power to dispose of the community property; thenceforth the parties stood upon equal grounds in that respect, and neither could wholly exclude the other from a participation in the property and its present disposition."

The next case, Estate of Silvey, 42 Cal. 210, was the first of a long line of cases, holding that upon the death of the husband the wife was entitled to one-half as survivor of the com-

munity. The court said:

"There is nothing, however, in the language of the will which evinces an intention on the part of Silvey to dispose of the entire estate. The devise must be real as applying only to that moiety which was within his testamentary power. A purpose to attempt the disposition by will of property which, by statute, would pass to the wife as survivor of the matrimonial community immediately upon his death, is not to be readily inferred, especially where, as here, the words employed by the testator may have their fair and natural import, by applying them only to that moiety of which he had by law the testan entary disposition.

"I am of opinion that the case of Beard v. Knox, 5 Cal. 252, is upon all the points involved, decisive of this case. The general question in that case, as here, concerned the effect upon the right of the surviving wife of a devise by the husband of the community

estate."

This was followed along the same line by King v. La Grange, 50 Cal. 330; Estate of Frey, 52 Cal. 661; Estate of Gwin, 77 Cal. 313; In re Gilmore, 81 Cal. 240, and In re Smith, 108 Cal. 115; Estate of Wickersham, 138 Cal. 355; Estate of Prager, 166 Cal. 453, and Estate of Rossi, 169 Cal. 149, in all of which the principle that the wife takes as survivor of the community is reiterated.

In the Estate of Brix (1919), 181 Cal. 667, many of the rights of

the wife are enumerated in the following language:

"Turning now to the facts of the case appellant claims that 61 the only consideration received by the decedent for the transfer in question was a waiver by his wife of all her interest in the community property, and that this is not an adequate consideration calling our attention in this connection to Spreckels v. Spreckels, 172 Cal. 775 (158 Pac. 537), and Dargie v. Patterson, 176 Cal. 714 (169 Pac. 360), and other earlier cases, holding that the title to the community property is in the husband and that the wife has during coverture no more than a mere expectancy like that of an heir. This rule is not determinative of the present case. (5) While the wife has no title to the community property nor estate or interest therein yet she has rights in relation thereto, the surrender of which may constitute a valuable and, according to the circumstances of the case, an adequate consideration for the transfer. She has a 'possible interest in whatever remains upon the dissolution of the community otherwise than by her own death.' (In re Burdick, 112 Cal. 393 (44 Pac. 735).) (6) Upon the death of the husband she takes onehalf of the community property, and upon a divorce she may in a proper case be awarded even the whole of it. (Civ. Code, secs. 146, 1402.) If a divorce is granted without any disposition of the community property, the former wife becomes the owner of one-half of the community property as tenant in common with her former husband. (De Godey v. De Godey, 39 Cal. 157; Biggi v. Biggi, 98 Cal. 35 (35 Am. St. Rep. 141, 32 Pac. 803); Hirschner v. Dietrich, 110 Cal. 502 (42 Pac. 1064). (7) If the husband makes a gift of community property without the wife's consent, she may upon his death recover from the donee one-half of the property so given. (Civ. Code, sec. 172; Dargie v. Patterson, supra.) The fact that she may thus attack a conveyance by the husband made without her

consent, on the ground that it was a gift, has a practical ap-62 plication that renders it a great disadvantage to a husband not in cordial relations with his wife. (8) It has become the universal custom with purchasers of real property to insist on her signature to all contracts relating thereto. The custom is so general that it is a matter of common knowledge of which the court may take judicial (16 Cyc. 873; Irwin v. Phillips, 5 Cal. 146 (63 Am. Dec. 113); Goldsmith v. Sawyer, 46 Cal. 212; Storrs v. Los Angeles Traction Co., 135 Cal. 94 (66 Pac. 72); Gorgan v. Chaffee, 156 Cal. 611 (27 L. R. A. (N. S.) 395, 105 Pac. 745).) In the actual dealings of the husband in community real estate this gives her a practical control or power of interference which may be a great burden to Where a husband and wife are not in accord but live in strained relations, as was the case here, the adjustment of their relationship as to property so that this power of the wife to control, object or interfere is taken away may be a consideration of very great pecuniary value to the husband and fully adequate for a transfer of valuable real estate."

In Schneider v. Schneider, 183 Cal. 336, the parties had lived together as man and wife, in the innocent belief that they were married. In a divorce action, however, it developed that the marriage was void. The question arose as to whether or not the putative wife was entitled to half of the property accumulated during this relation. In holding that she was so entitled the Supreme Court said:

"In California, as in Texas, the common law is the general rule of decision, but in both States the law regulating the mutual property rights of married persons is radically different from that law; and while we do not wish to be understood as saying that the rule of the common law as to husband and wife apply to no case under our system, yet we agree with the Texas courts that the common-

law rule as to the consequences of a void marriage upon the mutual property rights of the parties to it is inapplicable where the community property régime prevails. This conclusion is dictated by simple justice, for where persons domiciled in such a jurisdiction, believing themselves to be lawfully married to each other, acquire property as the result of their joint efforts they have impliedly adopted, as is said in the Texas case cited, the rule of an equal division of their acquisitions, and the expectation of such a division should not be defeated in the case of innocent persons."

Finally, the case of Taylor v. Taylor, 192 Cal. 71, was decided one day after the petition for rehearing in Roberts v. Weymeyer was denied. In the Taylor case a decree of divorce between the parties had been rendered in Nevada without specifically disposing of the community property. The Supreme Court held that the wife, under such circumstances, was "the owner of one-half of such property as tenant in common with respondent." (Citing Estate of Brix, supra.)

4. The discussion of these cases will perhaps answer the Government's contention that this court is bound by the decisions of the Supreme Court of California. But, in addition to that, the follow-

ing considerations occur:

(a) This court is considering the effect of a Federal statute. It is not, of course, contended that the real question—that is, whether the wife had such an interest in community income as to make it separately taxable—has ever been before the Supreme Court of this State.

(b) If the decisions in California, taken all together, have not

clearly determined the question, this court is not bound.

(c) If the Supreme Court of the United States and the Circuit Court of Appeals in a California case have passed upon the question, then this court is bound by their decisions, even if

they conflict with the decisions of the State courts.

The tax here is a tax upon income. By the statute law of California, whatever is earned by both husband and wife, as well as the products of community property, become a part of the community. Generally that income is produced by the industry, and professional. economic, or commercial acumen of the husband; generally, but not always. In an increasing number of cases the wife in fact, by her labor and ability, adds materially thereto. But in the ordinary case, where the wife's contribution is the conduct of the household and the care of her children, it can be said that in every practical sense she is contributing to the earnings of the husband. It will not do to say that she has no interest in those earnings until her husband dies, or she is divorced. It is probable that a large part of the advancement in the useful arts, and the creation of wealth, is due to the natural ambition of the wife. It is the marriage which creates the ownership; death or divorce merely give possession. Her interest is not merely in support for herself and her children. It is in the fact that her security is fortified by the creation of a fund, which in any contingency shall be available to her. To tax the income, as if it all belonged to the husband, is to unduly diminish that fund; it is in effect, and in practical consequence, to compel the wife to pay an additional tax upon her just share, and to tax her portion under the disguise of a levy upon her husband. In practical effect, likewise, if her husband has separate estate, the whole community income is added to his separate income, and the surtax upon the sum of the two further depletes the community accumulations. If the wife actually earns money, she is obliged to add that to her husband's income, either earnings or the product of his separate estate, and thus pay surtax on the combination.

65 seems to me that the whole income can be taxed to the husband only if it is that husband's income, to apply the distinction, as the Supreme Court said in Eisner v. Macomber, 252 U. S. 206, "according to truth and substance, without regard to form." And the truth and substance is that only one-half of the income really belongs to the husband; the other half, in law and right and justice, to the wife.

Let the plaintiff have judgment as prayed.

PARTRIDGE,

[File endorsement omitted.]

66

In United States District Court

[Title omitted.]

Judgment filed April 29, 1925

The above-entitled cause came on regularly to be heard on the 20th day of April, 1925, before the above-entitled court, Hon. John S. Partridge, judge thereof, presiding, all parties present and represented by counsel, and the cause was duly heard and submitted upon the agreed statement of facts, duly filed herein, and thereafter the court having caused a written opinion to be filed in the cause, setting forth that the cause was and is submitted upon said agreed statement of facts, and setting forth the specific findings by the court of the facts in said cause, and the conclusions of the court upon all questions of law involved in the case, and rendering judgment thereon that plaintiffs have judgment as prayed:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered and adjudged by the court that the plaintiffs herein, in their capacity as executors of the last will and testament of R. D. Robbins, also known as Reuel Drinkwater Robbins, also known as Reuel D. Robbins, deceased, do have and recover of and from defendant the sum of six thousand seven hundred eighty-eight and 03/100 dollars (\$6,788.03), with legal interest from the 15th day of March, 1919, together with costs taxed at \$154.45.

Judgment entered April 29, 1925.

A true copy, attest:

[SEAL.]

[File endorsement omitted.]

WALTER B. MALING, Clerk.

WALTER B. MALING, Clerk.

In United States District Court

[Title omitted.]

Clerk's certificate filed April 29, 1925

I, Walter B. Maling, clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment roll in the above-entitled action.

Attest my hand and the seal of said District Court, this 29th day

of April, 1925.

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[SEAL.] WALTER B. MALING, Clerk.

[File endorsement omitted.]

In United States District Court

[Title omitted.]

Petition for writ of error filed May 9, 1925

Comes now the United States of America, the defendant in the

above-entitled action, and shows:

That heretofore, to wit, on April 29, 1925, in the District Court of the United States for the Northern District of California, judgment in favor of the plaintiffs in the above-entitled action and against the defendant, United States of America, in the sum of \$6,788.03, with a legal interest from March 15, 1919, and for costs in the sum of \$154.45, was rendered and entered, in which said judgment and in the proceedings had prior thereto in this cause certain errors were committed to the prejudice of the said defendant, all of which will appear more in detail from the assignment of errors which is filed with this petition;

Wherefore, said defendant, United States of America, prays that a writ of error may issue in this behalf out of the Supreme Court of the United States to the said district court for the correction of the errors so complained of, and that the transcript of the record,

proceedings, and papers in this cause, duly authenticated, may

be sent to the Supreme Court of the United States.

Dated: May 9, 1925.

Sterling Carr,
United States Attorney,
T. J. Sheridan,
Assistant United States Attorney,
A. W. Gregg,
Solicitor of Internal Revenue,
F. W. Dewart,

Special Assistant to the Attorney General, Attorneys for Defendant, United States of America,

[File endorsement omitted.]

#### In United States District Court

[Title omitted.]

Assignments of error filed May 9, 1925

Comes now the United States of America, defendant in the aboveentitled cause, in connection with and as a part of its petition for a writ of error filed herein, makes the following assignment of errors, which it avers were committed by the District Court in the proceedings and judgment against it, appearing in the record herein and upon which it will rely in the prosecution of the writ of error whereby it expects to secure a reversal of the judgment made therein; that is to say:

First. The District Court erred in drawing the conclusion of law from the facts found that the plaintiffs were entitled to judgment in the sum of \$6,788.03, or any other sum, or with legal interest

thereon.

Second. The District Court erred in holding that upon the facts stated in the complaint, or the facts set forth in the agreed statement of facts, the plaintiffs were entitled to recover the sum demanded or

any sum.

Third. The District Court erred in its decision that under the laws of the State of California community property owned by husband and wife is or ever was of such character that the husband and wife were entitled to file separate income-tax returns for Federal taxes, each for the one-half of the income thereof.

Fourth. The District Court erred in holding that any part of the community income received on community property in the State of California was income to the wife under the Federal revenue act of 1918, or that any part of the said community income was not the

income of the husband under the said act.

Fifth. The District Court erred in holding that the sum of \$6,788.03, or any part thereof demanded and collected from R. D. Robbins, plaintiffs testate, by the defendant for the year 1918 was a tax illegal or unauthorized or in holding that the tax was not properly due or was uncollectible from said plaintiffs testate.

Sixth. The District Court erred in rendering and entering the said judgment for the reason that under the laws of the State of California respecting the community estate all community income is received by and belongs to the husband and no part thereof is

received by or belongs to the wife.

Seventh. The District Court erred in giving and entering judgment

upon the findings of fact as made.

Wherefore and on account of said manifest errors and each of them, all of which errors appear upon the record of said cause and in the decision and judgment of said District Court, the United States of America, defendant in the said cause, prays that the judgment of said District Court in said cause may be reversed and set aside.

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Sterling Carr,
United States Attorney,
T. J. Sheridan,
Assistant United States Attorney,
A. W. Gregg,
Solicitor of Internal Revenue,
F. W. Dewart,
Special Assistant to the Attorney General,

Attorneys for Defendant, United States of America.

[File endorsement omitted.]

In United States District Court

[Title omitted.]

Order allowing writ of error filed May 9, 1925

The above-entitled cause coming before me on the petition of the United States of America, defendant therein, for a writ of error from the Supreme Court of the United States to the above court of the United States in and for the northern district of California, and upon examination of said petition and the record in said matter, and desiring to give the defendant an opportunity to present in the Supreme Court of the United States the questions presented by the record in the said cause;

It is ordered that a writ of error be, and the same is hereby, allowed from the Supreme Court of the United States to the District Court of the United States in and for the Northern District of California in the above-entitled cause, and that since the United States of America is the plaintiff in error of the said writ of error,

it is ordered that no bond or other surety be required.

Dated: May 9, 1925.

(Sgd.) JOHN S. PARTRIDGE, United States District Judge.

[File indorsement omitted.]

In United States District Court

[Title omitted.]

75

Praecipe for transcript of record filed May 11, 1925

To the clerk of said court.

Sir: The plaintiff in error in the writ of error heretofore sued out in the above-entitled cause, hereby indicates the following portions of the record in the said cause to be incorporated in the transcript of the record in such writ of error, to wit, the judgment roll in

the said cause, including particularly the complaint, answer, agreed statement of facts, the court's findings of fact and opinion, the judgment, also the petition for a writ of error, assignments of error filed therewith, with prayer for reversal, and the order allowing the writ of error.

Sterling Carr,
United States Attorney,
T. J. Sheridan,
Assistant United States Attorney,
A. W. Gregg,
Solicitor of Internal Revenue,
F. W. Dewart,
Special Assistant to the Attorney General,

Attorneys for Defendant.

Attorneys for Plaintiffs.

Service of the within praecipe is hereby acknowledged this 11th day of May, 1925.

LLOYD M. ROBBINS,
PETER F. DUNNE,
CAREY VAN FLEET,
ROBBINS, ELKINS & VAN FLEET,
DUNNE, BROBECK, PHLEGER & HARRISON,
PRESTON & DUNCAN,
O'MELVENY, MILLIKIN, TULLER & MCNEIL,

751/2

[File endorsement omitted.]

76 In United States District Court

[Title omitted.]

Clerk's certificate

I, Walter B. Maling, clerk of the District Court of the United States for the Northern District of California, do hereby certify the foregoing seventy-five (75) pages, numbered from 1 to 75, inclusive, to be full, true, and correct copies of the record and proceedings as enumerated in the praccipe for record on writ of error, as the same remain on file and of record in the above-entitled cause, in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost for preparing and certifying the foregoing transcript on writ of error is the sum of \$32.90 and that the same will be charged to the United States in my next quarterly account; and that the original writ of error and citation issued in

said cause are hereto annexed.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court this 12th day of May, A. D. 1925.

[SEAL.] WALTER B. MALING,

Clerk of the United States District Court for the

Northern District of California.

#### In United States District Court

Writ of error filed May 9, 1925

UNITED STATES OF AMERICA, 88:

The President of the United States of America, to the honorable the judges of the District Court of the United States for the

Northern District of California, greeting:

Because, in the record and procedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between United States of America, plaintiff in error, and Reuel D. Robbins, jr., and Sadie M. Robbins as executors of the last will and testament of R. D. Robbins, also known as Reuel Drinkwater Robbins, also known as Reuel D. Robbins, deceased, defendants in error, a manifest error hath happened, to the great damage of the said United States of America, plaintiff in error, as by

its complaint appears:

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, within sixty days from the date hereof, in the said Supreme Court of the United States, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United Sates, should be done.

Witness, the Honorable William Howard Taft, Chief Justice of the United States, the 9th day of May, in the year of

our Lord one thousand nine hundred and twenty-five.

[SEAL.] WALTER B. MALING,
Clerk of the United States District Court.

Allowed by

John S. Partridge, District Judge.

May 9, 1925. [File endorsement omitted.]

In United States District Court

Return to writ of error

The answer of the judge of the District Court of the United States in and for the Northern District of California, second division.

60468-25-4

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court to the Supreme Court of the United States, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the court. [SEAL.]

Walter B. Maling, Clerk United States District Court for the Northern District of California.

[Citation in usual form showing service on L. M. Robbins et al. Omitted in printing.]

81 (Indorsement on cover:) File No. 31214. N. California D. C. U. S. Term No. 493. The United States of America, plaintiff in error, vs. Reuel D. Robbins, jr., and Sadie M. Robbins, as executors of the last will and testament of R. D. Robbins, etc. Filed May 21st, 1925. File No. 31214.

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# In the Supreme Court, of

# United States

OCTOBER TERM, 1925

NOV 30 1925

WM. R. STANSBU

No. 493

THE UNITED STATES OF AMERICA, Plaintiff in Error,

VS.

REUEL D. ROBBINS, JR., and SADIE M. Robbins, as Executors of the Last Will and Testament of R. D. Rob-BINS. etc.,

Defendants in Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

### Volume I.

## BRIEF FOR DEFENDANTS IN ERROR.

LLOYD M. ROBBINS, PETER F. DUNNE. CAREY VAN FLEET. Crocker Building, San Francisco, Calif., Attorneys for Defendants in Error.

ROBBINS, ELKINS & VAN FLEET, of San Francisco,

DUNNE, BROBECK, PHLEGER & HARRISON, of San Francisco,

O'MELVENY, MILLIKIN, TULLER & MACNEIL, of Los Angeles, Of Counsel for Defendants in Error.



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No. 1249.

# In the Supreme Court

OF THE

## United States

October Term, 1925.

THE UNITED STATES OF AMERICA,

Plaintiff in Error,
vs.

R. D. Robbins, Jr., et al., Executors, etc.,

Defendants in Error.

In Error to the District Court of the United States, For the Northern District of California.

## BRIEF FOR DEFENDANTS IN ERROR.

#### STATEMENT.

This case has been advanced for hearing on motion of the United States, plaintiff in error, made through the Solicitor General. Opposing counsel joined in requesting that the case be advanced. In the printed motion to advance, it is said by the Solicitor General, that this is "an important test case." It would, we venture to think, be more accurate to say that the important test case was Blum v.

Wardell, 270 Fed. 309, decided by Judge Rudkin, now of the Circuit Court of Appeals for the Ninth Circuit, affirmed by the Circuit Court of Appeals, 276 Fed. 226, certiorari denied by this court, March 6, 1922 (258 U. S., 617), and determining that the wife, in California, as in each and every of the other seven community property states, has "a valid, subsisting, vested interest and estate in the community property during the life of the husband." For, the motion to advance goes on to say,—

"It raises the question whether the income from community property in the State of California is taxable under the Revenue Act of 1918 to the husband alone, or one-half to each the husband and the wife."

This court said, to the point, in *Home Savings* Bank v. Des Moines, 205 U. S. 503, 510-511:

"With respect to taxation usually, if not necessarily, property and its owners are inseparable. Taxes are assessed against persons upon the property which they own, not upon property which others own."

If, as was finally determined in *Blum v. Wardell*, supra, the wife has "a vested interest and estate in the community property during the life of the husband," she is taxable on community income to the extent of her one-half estate therein, the husband is taxable to the extent of his one-half; neither is taxable on property, the vested estate of which is in the other. *Blum v. Wardell* sought and found the test. The case at bar comes in sequel.

Blum v. Wardell differed from the case at bar, not in that principle of ownership which underlies the incidence of taxation, but in the circumstance that the tax there in question, was the federal estate If the wife had no vested estate in one-half of the community property; if the whole of such property was vested in the husband, to the exclusion of the wife,-it constituted part and parcel of his estate, as much after his death as when he was alive; the transfer of one-half of that community property to the surviving wife, would be made to her through the estate of the husband; it would become her estate only after it had ceased to be his, and by transfer from and through him. The incidence of the federal estate tax, it was argued by the government, fell accordingly upon the transfer to the wife. But the decision was, that the wife took, not by transfer through the estate of her husband, but in her own right, as the surviving member of the community, by virtue of her vested estate in one-half of the community property during the marriage. And upon that vested estate, the incidence of the federal income tax should fall.

## Opinion of Attorney General as to Texas Community.

Blum v. Wardell was decided in the District Court for the Northern District of California, Southern Division, on December 30, 1920. It was affirmed in the Circuit Court of Appeals for the Ninth Circuit, on October 24, 1921. On August 24, 1920, some four months prior to the decision of the District

Court, the Attorney General of the United States. Hon. A. Mitchell Palmer, in compliance with the request of the Secretary of the Treasury, Hon. D. F. Houston, rendered the opinion of the Department of Justice in respect to the incidence of the federal income tax in the community property State of Texas, as between husband and wife. The opinion is set out in full in the appendix to this brief, and is officially reported in T. D. 3071. The community property law of California, it will be made to appear, goes farther than the community property law of any other community property state, in its recognition and protection of the vested interest of the wife. Dealing, now, with the law of Texas, the attorney general, after a full consideration, concludes that "the income from community property" as community property has been defined by the statutes of Texas, "is community income, and, therefore, husband and wife domiciled in Texas, in rendering separate income tax returns, may each report as gross income, one-half the total income from such community property." This conclusion rested on his determination that one-half of the community property vested in each spouse. one-half of all community property vests in each spouse," he goes on to say, "it follows that one-half of the increase and revenues from separate property of the spouses, except increase and rents and revenues from lands (the law of Texas made the revenues from the separate estates of the spouses community property, except as to lands), is income to each of said spouses. Community property, under the laws of Texas, belongs jointly to husband and wife; it follows that the income therefrom accrues to the husband and wife in equal shares."

#### Action of Treasury Department.

Following this opinion, the Treasury, on September 18, 1920, issued its instructions to the Collectors of Internal Revenue:

"Office of Commissioner of Internal Revenue, Washington, D. C.

To Collectors of Internal revenue and others concerned:

There is given below in full for your information and guidance an opinion rendered by the Attorney General under date of August 24, 1920, dealing with the right of husband and wife domiciled in certain States having so-called 'community property' laws to divide certain of their income for the purpose of the income tax.

WM. M. WILLIAMS.

Commissioner of Internal Revenue.

Approved September 18, 1920:
D. F. Houston,

Secretary of the Treasury."

Since September 18, 1920, to take the words of the motion to advance, "it has been the established rule of the Treasury Department," in respect to community property in the State of Texas, "that the income from such property was taxable," one-half to the husband, one-half to the wife. The practice of the Department has been consistent, so far forth, and undeviating.

Opinion of Attorney General as to Other Community States.

On February 26, 1921, two months after the decision of the District Court in *Blum v. Wardell*, supra, and six months prior to the decision of the Circuit Court of Appeals, the Attorney General of the United States, Honorable A. Mitchell Palmer, in compliance with the request of the Secretary of the Treasury, Hon. D. F. Houston, rendered the opinion of the Department of Justice in respect to the incidence of the federal income tax, in the community property states other than the State of Texas; in the states, that is to say, of Washington, Arizona, Idaho, New Mexico, Louisiana, Nevada, and California. As to all of these states, with the single exception of California, he concluded, as he had already determined with respect to Texas, that

"in Washington, Arizona, Idaho, New Mexico, Louisiana, and Nevada, the husband and wife domiciled therein, in rendering separate income tax returns, may each report as gross income, one-half of the income which, under the laws of the respective states, becomes, simultaneously with its receipt, community property."

This opinion of the Attorney General reviews the statutes and the decisions of the courts of the several community property states. Those statutes, in the main, are like those in California—indeed, in some instances, they are taken bodily from the Civil Code of California. If a difference there be, it is in the circumstance that the law of California goes a greater length in recognizing and safeguarding

the vested estate of the wife. Of the decisions of the courts in the community property states other than California, an excerpt by the Attorney General from the case of *LaTourette v. LaTourette*, 15 Ariz. 200, is typical:

"The law makes no distinction between the husband and wife in respect to the right each has in the community property. It gives the husband no higher or better title than it gives the wife. It recognizes a marital community wherein both are equal. Its policy, plainly expressed, is to give the wife, in this marital community, an equal dignity, and to make her an

equal factor in matrimonial gains.

"That the interest of the wife in the community property, during the coverture, is not a mere possibility-not the expectancy of an heir -is quite apparent. The old saying is not true (we beg to inject, of French, not of Spanish or Mexican origin), that community is a partnership which begins only at its end. Upon the dissolution of the community by death, the wife does not inherit her share of the community property; but with the death of the husbard, the management and control of the statutory agent or trustee ceases. The wife acquires, not her share, for that was already hers, but in addition to her share, she acquires the right of management, control, and disposition of that share, her status being thereby fixed as that of a feme sole. If there be no child or children of the deceased husband, all of the common property goes to the surviving wife. She has her share in the property, and, in addition, by right of survivorship and not as an heir, she acquires the share that belonged to the husband; and she takes all of the property in her own right, and, with respect to the management, control and

disposition of such property, is reduced to the status of a *feme sole*, and must henceforward, with respect to it, act for herself."

The Attorney General, in his opinion, saw, with clear eyes, that the ascertainment of a vested estate in the wife, during the marriage, making inapplicable to her one-half of the community property, an inheritance tax imposed on the transfer of the estate of her deceased husband, furnished, in identity of principle, the test and criterion of the subjection of her one-half of the community property to the incidence of the federal income tax, "assessed against persons upon the property which they own, not upon property which others own" (Home Savings Bank v. Des Moines, 205 U. S. pp. 510-511). He quotes appositely from the Supreme Court of Idaho, Kohny v. Dunbar, 21 Idaho, 258:

"Since the interests of both husband and wife are the same and equal in and to the community property, and each takes one-half upon the death of the other, and each may dispose of a one-half interest therein by will, it is clear to us that, if the wife must pay an inheritance tax on her half of the property upon the death of the husband, the husband would likewise be obliged to pay an inheritance tax on his half of the property on the death of his wife. The law clearly places them both on an equality in this respect. This illustration, however, accentuates the unreasonableness of the contention, for no one claims that the husband is required to pay such tax on his interest in the community estate."

In respect to California, the statutes, considered by the Attorney General, are incompletely set forth. For example, the quotation of the sections of the Civil Code of California, begins with Section 162 of the Civil Code, defining the separate property of the wife, followed by Section 163, defining the separate property of the husband, and by Section 164, defining the community property of husband and wife; but there is an inadvertent omission of Section 161 of the same Civil Code, reading:

"A husband and wife may hold property as joint tenants, tenants in common, or as community property."

And, again, there is an inadvertent omission of Section 682 of the same Civil Code, reading:

"Ownership of several persons. The ownership of property by several persons is either:

- 1. Of joint interests:
- 2. Of partnership interests;
- 3. Of interests in common;
- 4. Of community interest of husband and wife."

As to the decisions of the Supreme Court of California, it must be said, with deference, of the opinion of the Attorney General, that its treatment is meagre. But two cases are referred to, Spreckels v. Spreckels, 116 Cal. 339, decided in 1897, which makes the unhappy comparison of the wife's interest in the community property to the expectancy of an heir apparent, and which is in abrupt conflict, as



will be made to appear, with the greater number of the California decisions; and *Estate of Moffitt*, 153 Cal. 359, decided in 1908, subject to the same observations as the *Spreckels* case, echoing the error of that case without independent discussion, and repudiated in forthright way by the Legislature of California, in the inheritance tax law of 1917.

#### Action of Treasury Department.

This opinion of the Attorney General is printed in the appendix to this brief, and is officially reported in T. D. 3138. In accord with this opinion, and applying it to all the community property states except California, the Treasury Department, on May 3, 1921, issued its instructions to the collectors of the internal revenue:

"TREASURY DEPARTMENT,

Office of Commissioner of Internal Revenue, Washington, D. C.

To Collectors of Internal revenue and others concerned:

There is given below in full for your information and guidance an opinion rendered by the Attorney General under date of February 26, 1921, dealing with the right of husband and wife domiciled in certain States having so-called 'community property' laws, to divide certain of their income for the purpose of the income tax, and as to the inclusion of community property in the gross estate of a deceased spouse. See, in this connection, T. D. 3071.

WM. M. WILLIAMS,

Commissioner of Internal Revenue.

Approved March 3, 1921,
D. F. Houston,

Secretary of the Treasury."

Opinion of Attorney General as to California Community.

The discrimination against California, it is believed with deference, was invidious, and without warrant. It did not last long, so far as the Department of Justice is concerned. That Department, so far as in it lay, soon removed it. On December 12, 1923, the Secretary of the Treasury wrote the Attorney General, asking a reconsideration by the Department of Justice, of the opinion of Attorney General Palmer, which ruled, inter alia, that under the laws of California, the wife has no vested interest in the community property. In compliance with this request, the question in respect to California was re-examined in the elaborate and painstaking opinion of Attorney General Daugherty. That opinion is printed in the appendix to this brief, and is officially reported in T. D. 3569.

The opinion of the Attorney General was rendered on March 8, 1924. It is an opinion, as requested by the Secretary of the Treasury, dealing with the law of California. The laws of California, using that term in distinction from the decisions of the California courts, are first reviewed, precisely and exhaustively. Nothing is left out. The Constitution of California, of 1849, is set forth, Art. XI, Sec. 14, classifying property, in the case of husband and wife, into the separate property of the husband, the separate property of the wife, and the community property of husband and wife, and directing the Legislature to pass laws "more clearly defin-

ing the rights of the wife in relation as well to her separate property as to that held in common with her husband." Next comes the Statute of 1850 (Stats. 1850, p. 254), carrying out the mandate of the constitution, and giving statutory expression and detail to the community property system. The amendments of 1861 and 1863 are noted. The Codes of California, adopted in 1872, now follow. The pertinent sections, with all amendments thereto, are set forth in terms, without any omission. And the summary is made:

"From the first rough days of the Convention of '49, when plans for the formation of a State Government in California were laid, the Constitution and Statutes have recognized and preserved a community property system, practically the same as that which prevails in other community property states. So much for the Constitutional and Statutory marital property laws of California. Both are clear, and plainly bottomed upon a recognition of a property interest in the wife."

The opinion now turns to the "Decisions of California Courts," referred to as "a sea of uncertainty." Indeed, the divergence of the decisions along the lines, respectively, of the "expectancy" theory and the "vested right" theory, are likened to the forks of the capital letter Y. The decisions along these diverging lines are carefully examined, and it is well pointed out that the reasoning in the "expectancy cases" was moved by the consideration that the husband, with serious abatements, however,

had the sole management and control of the community estate. This confusion of management or agency with ownership, it is noted, was "a misconception of the system," as held by the Supreme Court of the United States in Warburton v. White, 176 U. S. 484, and Arnett v. Reade, 220 U. S. 311. Blum v. Wardell, supra, is reviewed. Reference is had to two decisions of the Supreme Court of California, subsequent to Blum v. Wardell, the earlier of which goes upon the "expectancy" theory, and the later upon the theory of vested right. The attorney general concludes that "No established rule can be gathered from the decided cases," and that Blum v. Wardell, supra,

"must be regarded as announcing the true rule, that the wife has a greater interest than the mere possibility of an expectant heir in community property, and that the California Statutes of 1917 clearly recognize that the wife's half of the community is not a part of the property of the deceased husband."

#### Action of Treasury Department.

This opinion removes the discrimination against California. It cancels the sentence of outlawry. It restores California to the family of community property states, to which California belongs by legitimate affiliation. On March 27, 1924, pursuant to this opinion, the Treasury Department issued its instructions to the Collectors of Internal Revenue:

"TREASURY DEPARTMENT,

OFFICE OF COMMISSIONER OF INTERNAL REVENUE, Washington, D. C.

To Collectors of Internal revenue and others concerned:

The following opinion of the Attorney-General under date of March 8, 1924, dealing with the right of husband and wife domiciled in California to divide certain of their income for the purpose of income tax, and as to the inclusion of community property in the gross estate of a deceased spouse, is published for your information and guidance. See, in this connection, T. D. 3138 and T. D. 3071.

D. H. BLAIR.

Commissioner of Internal Revenue.

Approved March 27, 1924,

A. W. MELLON,

Secretary of the Treasury."

It will be observed from the instructions thus given by the Secretary of the Treasury and the Commissioner of Internal Revenue to the various collectors, "for your information and guidance," that no difficulty or misunderstanding troubled the mind of the Treasury Department on March 27, 1924, as to the scope and consequences of the vested right of the wife, in its bearing, not alone upon the federal estate tax, but, as well, upon the federal tax on incomes. More than that, the Treasury Department went forward with the preparation of the forms of application for community tax refunds in California, consequent upon the recognition of a vested right in the wife, and those forms, if we are correctly advised, were actually distributed, or made

ready for distribution, to the Collectors of the Internal Revenue, for use in facilitating the refunds to California taxpayers.

#### Opinion of Attorney General Stone.

When Attorney General Stone came to be appointed the Treasury Department sought to re-open the question by requesting him to withdraw the opinion of March 8, 1924, for further consideration: and he did so withdraw it on May 27, 1924. withstanding the instructions of the Treasury Department to the collectors of internal revenue for their "information and guidance," applying the opinion of March 8, 1924, as well to federal income taxes as to federal estate taxes, the Treasury Department, in its request for Attorney General Stone's opinion, by an inadvertence, singular, almost inexplicable, omitted to ask in terms for his opinion with respect to federal income taxes, and it is now assuming, despite its own recognition of the identity of principle, to make a discrimination, in applying the principle, between federal estate taxes and federal income taxes.

After argument and briefs and on the fullest consideration, Attorney General Stone, on October 9, 1924, referring to the opinion of March 8, 1924, felt himself "constrained to re-establish and reaffirm that opinion." The request of the Secretary of the Treasury to Attorney General Stone, to recall the opinion of March 8, 1924, "for further con-

sideration and review," was made, as appears from the Opinion of the Attorney General, on May 27, 1924. The determination of the Attorney General, expressed in his opinion of October 9, 1924, was not released by the Treasury Department until January 27, 1925. The release was accompanied by a statement or "announcement" by the Treasury, to which was attached a letter of the same date, Jany. 27, 1925,—"after conference with Attorney General Stone," says the announcement,

"he wrote the Treasury a letter, copy of which letter is attached, in which he stated that the Treasury should be left free to litigate the question of income tax, if, in its judgment, the public interest would be served by a judicial determination of it."

But Attorney General Stone wrote something more. He warned the Treasury that

"in any such litigation, argument that the same rule must apply to California because it has been applied in other states, will, of course, be advanced because of the several years acquiescence to this view by your Department."

#### And he adds:

"If, however, you decide to litigate this point with respect to income from community property in California, this Department will render you such assistance in the litigation as you may desire, from the United States Attorney's Office, or any branch of the Department of Justice, and it will do everything possible to bring such litigation to a speedy conclusion."

The Treasury announcement refers to the fact that in other community property states, as authorized by Treasury regulations, husband and wife make divided returns, but feels "grave doubt of the legality of these regulations". And this "grave doubt" is put upon the inaccurate statement that the husband "has complete control of the community income and may dispose of it as he sees fit", a statement inaccurate as well in point of legal effect, as of verbal expression, exemplifying the "confusion between the practical effect of the husband's power and its legal ground" (Arnett v. Reade, 220 U. S. 311, 320). The Treasury announcement also contained a statement implying that a refund to the California tax-payer must be collected from citizens of non-community states--a singular statement, since the excess, illegally taken, as we submit, from the California taxpavers, went to increase the deposits in the Treasury, and it is only the amount of that excess which the California taxpayers are seeking to have the Treasury pay back.

This Treasury announcement, Attorney General Stone's letter attached thereto, and the opinion and conclusion of Attorney General Stone, are printed in the appendix to this brief. Attorney General Stone, referring to Blum v. Wardell, supra, observes that

"the precise question passed upon by the Attorney General, in his opinion of March 8, 1924, has been litigated in the federal courts to final judg-

ment; the government has exhausted its resources in that litigation to secure a judicial review of the question, and that question has been finally judicially determined, so far as that litigation is concerned, adversely to the contentions of the government."

The government, Attorney General Stone goes on to say,

"would, in my opinion, be justified in re-opening this litigation in a new case, with its consequent burden to citizens and taxpayers, only upon the basis of new facts, or a new interpretation of the rules of community property law in California, unknown or not available to the court at the time of the original litigation, on which reasonable hope for a successful issue could be predicated."

Whatever the confusion in the decisions of California courts may have been, there was no confusion in the mind of Attorney General Stone as to the precise question, the vested interest of the wife, arising and determined in *Blum v. Wardell*.

"The sole basis", he writes to the Treasury, "for the controversy between the government and the taxpayer in *Blum v. Wardell*, was the confusion existing in the judicial decisions of the courts of California as to the nature of community property, and particularly the interest of the surviving widow. As was indicated in the opinion of March 8, 1924, one line of judicial opinions of the courts of California has asserted that the property and ownership in community property was in the husband, and that the wife took only by inheritance, and that her interest

therein was a mere expectancy like that of the heir at common law. In the other line of judicial opinions, it was asserted, with equal vigor, that the interest of the wife in community property was a vested interest, that, as survivor of the husband, she takes by right of her ownership in the community property, and not by inheritance, and that the legal relationship of the husband to the wife's interest, was merely that of one vested with a power of disposition of that interest. It is quite clear that if either of these two diverse lines of definition of this legal relationship be literally accepted, such acceptance would be a sufficient basis for the determination of the question under consideration. the widow takes by virtue of her ownership in community property, which is held by the community subject only to the power of disposition of the husband, obviously the estate tax has no application. If, on the other hand, she takes only as heir of her husband, then equally obviously, the interest passing to the widow by inheritance is subject to estate taxes."

Attorney General Stone makes reference to the extensive review of California Statutes and Decisions in the opinion of March 8, 1924, and

"it suffices to say", he goes on, "that the court in *Blum v. Wardell* accepted the view that the interest of the wife in community property is a vested property interest, for which there is ample support in one group of decisions of the California courts; and which view is fortified by the series of statutes in that State limiting the husband's power of disposition of the community property."

He also notes that the court in Blum v. Wardell

"further supported its decision by the view of the United States Supreme Court as to the nature of the wife's interest in community property, in *Arnett v. Reade*, 220 U. S. 311."

He refers to two California cases, at that time the most recent, the earlier of which goes upon the notion of expectancy, the later on that of vested right, and he "leaves it to others to reconcile the decisions in these cases"; and he thinks that "if confusion existed before, so far as the California decisions are concerned, it is now the more confounded". The federal court, he points out, had the power, and was under a duty, to determine the question.

"A study of the true character of that interest" ("the wife's interest in community property") he adds, "as it existed in the Spanish law, and as it has been developed in the jurisprudence of the community property states, including California, affords no substantial basis for the hope that a renewal of the litigation on this subject in the federal courts would change the result."

Turning to the community property States other than California,

"the application of the federal estate tax law", he says, "in other community states, and the legislative history of the matter, are not without weight in determining whether the question should now be re-opened. It is conceded that the interest of the surviving wife in community property in some seven other community property states is exempt from the estate tax under

laws described by the district court as identical with the Statute law of California (Blum v. Wardell, 270 Fed. 309, 314). Nothing short of some controlling necessity would, I think, justify the court in upholding the tax in a single state, and refusing to apply it to an interest substantially the same in the other community property states."

#### Attitude of Congress.

It is of interest to note, as part of the legislative history germane to the question here, the refusal of Congress to change the existing income tax law by a proposed amendment requiring the income of husband and wife, under the community property law of California, to be returned, for purposes of taxation, as a single income of the husband. Attorney General Stone has this to say:

"Since the Act of 1916 there have been two general revisions of the Revenue Law; the Revenue Act of November 23, 1921, (ch. 163, 42 Stat. 227) and the recent Act of June 21, 1924. While the Act of 1921 was under consideration, I am informed that officials of the Treasury attempted to have a provision inserted making community property a part of the gross estate. The Ways and Means Committee refused to accept this proposed amendment. In the Bill which was prepared in the Treasury Department, and which as amended became the Act of 1924, there was a provision requiring so-called joint income of husband and wife under the Community Property law of California, to be returned, for purposes of taxation, as a single income of the husband.

"After hearings before the Ways and Means Committee and the submission of extensive briefs in opposition to the proposal, the Committee struck from the bill the provision for taxing community income as single income; and the bill, as enacted, did not set aside or modify the application of the legal rule laid down in Blum v. Wardell. Notwithstanding the fact that there have been two general revisions of the Revenue Act, and the question involved in the decision of Blum v. Wardell has been distinctly presented to the legislative branch of the Government, the principle of that decision has been left undisturbed by Congress."

It should here be remarked that the opinion of Attorney General Dougherty was rendered March 8, 1924, while the Revenue Act of 1924 was not passed until June of that year. The opinion of Attorney General Daugherty, therefore, was before Congress when it rejected the provision requiring so-called joint income of husband and wife under the Community Property law of California, to be returned for purposes of taxation, as a single income of the husband.

It was the foregoing course of history, judicial decision, and opinions of the Attorney General of the United States, that led to the present situation, to the institution of the case at bar, the so-called test case. There is no question of fact open. The facts are all agreed. They are embodied in an agreed statement. A question of law alone is presented: Does income of husband and wife, separate property

apart, under the laws of the State of California, simultaneously with its receipt, become community property, vesting one-half in each of the spouses, and can husband and wife, domiciled therein, in rendering separate income tax returns, each report as gross income one-half of such community income?

#### T.

THE COMMUNITY PROPERTY LAW OF CALIFORNIA, AS OF THE OTHER COMMUNITY PROPERTY STATES, WAS DERIVED FROM THE SPANISH-MEXICAN LAW OF THE COMMUNITY SYSTEM, UNDER WHICH HUSBAND AND WIFE WERE CO-PROPRIETORS AND EQUAL OWNERS OF THE COMMUNITY ESTATE.

Recognition of Spanish-Mexican Origin by Courts of California.

In Meyer v. Kinzer, 12 Cal. 248, 252, Mr. Justice Field, after quoting the language of the Act of 1850, providing that "all property acquired after marriage by either husband or wife, except such as may be acquired by gift, bequest, devise or descent," was community property, and after referring to the section of the Act which gives the husband management and control of the common property, with the like absolute power of disposition as of his separate estate, goes on to say:

"These provisions of the statute are borrowed from the Spanish law, and there is hardly any analogy between them and the doctrines of the common law in respect to the rights of property consequent upon marriage. The statute proceeds upon the theory that the marriage, in respect to property acquired during its existence, is a community of which each spouse is a member, equally contributing by his or her industry to its prosperity, and possessing an equal right to succeed to the property after dissolution, in case of surviving the other. To the community, all acquisitions by either, whether made jointly or separately, belong."

In *Packard v. Arellanes*, 17 Cal. 525, 537, it was said by the Supreme Court of California:

"Our whole system by which the rights of property between husband and wife are regulated and determined, is borrowed from the civil and Spanish law, and we must look to these sources for the reasons which induced its adoption, and the rules and principles which govern its operation and effect."

And even in the *Estate of Moffitt*, 153 Cal. 359, 363, which erred so grievously in respect to the vested estate of the wife, it was said:

"The Spanish-Mexican civil law was, of course, the law in force in California at the time of its cession by Mexico to the United States, and it was the design of the Constitution of 1849 to preserve, so far as might be, to the wives of the inhabitants of the new state, most of whom were at that time citizens of Spain or Mexico, the rights to the community property which they had enjoyed under the Mexican rule."

And in Spreckels v. Spreckels, 116 Cal. 339, 347, the "expectancy" case on which Estate of Moffitt, supra, was rested, it is said:

"The system of the community in California, Louisiana and Texas was inherited from Spain or Mexico, and simply continued with such changes as were deemed desirable. It was adopted in Washington, Nevada, Idaho and Arizona."

New Mexico is inadvertently omitted from this enumeration.

#### Mexico Derives From Spain.

Mexico took its law from Spain, took it almost literally. The community system has been part of the written law of Spain since the seventh century, if not before. And the dominant principle of the Spanish system has been that the matrimonial gains, the "gananciales", the community property, even as it is described today in the civil code of California, belonged to the husband and wife equally, by halves, during the marriage.

#### Historical Beginnings of Spanish Law of Community.

The Spanish law of community takes us back to the twilight of the Middle Ages. It was of Gothic, not Roman, origin. It was Euric, king of the Visigoths from 467 to 484, who finally subjected the Roman peninsula, now Spain, to Visigothic rule. It was he who first caused to be reduced to writing the laws of the Visigoths, known as the Code of Euric, afterwards incorporated, to a greater or less degree, in the historic Fuero Juzgo, also known as the Forum Judicum, which was promulgated in 693. As Walton expresses it in his Civil Law in Spain, pp.

32-33, 42-43, "the latter remarkable and original Code, the Fuero Juzgo, had for its basis a multitude of institutions purely Germanic, such as the property of the conjugal community (gananciales), and advantages (mejoras), which, even today, are of much importance in Spanish Civil Legislation". The Fuero Juzgo deals with the gananciales, the matrimonial gains, in Law 16, Title 2, Book IV. This early law would appear to deal with the gananciales on a proportional or pro rata basis—on the principle, that is to say, of assigning the matrimonial gains to the spouses in the proportions, respectively, of the contributions which they made in the first instance to the community. We note this in passing. The community system of Spain and Mexico, as we know it today, with its equality of ownership in the spouses, and its assignment of the management or administration of the common estate to the husband, comes down, without a break in continuity, from the Spanish Code, known as the Fuero Real, which was promulgated in Spain in 1255, by Alphonso the Learned (Schmidt's Civil Law in Spain and Mexico, Introductory History, p. 28; Appendix I, p. 82, of this brief).

#### Fuero Real.

In Law 1, Title 3, Book III of the Fuero Real, it is provided:

"Toda cosa que el marido y la muger ganaren o compraren, estado de consuno, hayanlo ambos por medio." Or, translated into English,

"Everything which the husband and wife shall earn or purchase during the union, let them both have it by halves."

And this same law of the Fuero Real draws the distinction between community property, as belonging to both by halves, and separate property as belonging to the one or to the other individually, and in exclusion. The law in question goes on to say:

"Y si fuere donadio de Rey o de otri, y lo diese a ambos, hayanlo marido y muger; y si lo diere al uno, hayanlo solo aquel a quien lo diere."

To give the English:

"And if it is a gift of the King or other person, and given to both, let husband and wife have it; and if it be given to one, let that one alone have it to whom it may have been given."

"Everything," then, "which the husband and wife shall earn or purchase during the union, let them both have it by halves",—that was the foundation stone of the Spanish community system, laid deep and enduring, 700 years ago. The Statute of the Fuero Real of 1255, like the Constitution and Statutes of California, like the Statutes of the seven other community property states, "proceeded upon the theory," to use the words of Mr. Justice Field, in Meyer v. Kinzer, 12 Cal. 248, 252, "that marriage, in respect to property acquired during its existence, is a community of which each spouse is a member,

equally contributing by his or her industry to its prosperity, and possessing an equal right to succeed to the property after dissolution, in case of surviving the other. To the community, all acquisitions by either, whether made jointly or separately, belong."

#### The Partidas.

The Fuero Real, says Schmidt (Appendix I, p. 84), "was only intended as a precursor to the larger and more comprehensive Code known as the Siete Partidas (Seven Parts)" published in 1263, and "authoritatively promulgated as the law of the land" in 1348, during the reign of Alphonso XI. The Partidas and the Fuero Real are to be read together. The Fuero "bears the same relation to the Partidas," (Schmidt loc. cit.) "as the Institutes of Justinian to the Pandects", and he refers to the opinion of the Spanish Jurist, Don Gregorio Mayans y Syscar.

The Partidas distinguish between the dowry which the wife brings to the husband at the marriage, and the donation which the husband makes to the wife on account of his marriage with her; and finally, between these and the gananciales, or community property. In Law 1, Title 11 of the Fourth Partida, it is said:

"That which the wife gives the husband on account of marriage, is called dowry. It is a sort of donation made with a view to her maintenance, and to the support of the marriage, and according to what is said by the ancient sages, it is, as it were, the patrimony of the wife. And that which the husband gives the wife, on account of marriage, is called in Latin, donatio propter nuptias, which means, a donation which the man gives the woman, on account of his marriage with her; and which, in Spanish, is properly called arras."

Law 24 of the same Title and Partida, deals with marriage contracts, and covers not only the dowry and arras, but, as well, the gananciales of the Fuero Real.

Such contracts, it is said, are given effect according to the law of the matrimonial domicile, notwithstanding that after marriage, the spouses "may chance to go and live in another country, in which a custom prevails repugnant to the agreement they had entered into". Indeed, it is said in the place cited: "The custom of the country where they contracted the marriage ('if they had not entered into any agreement'), ought to have effect as it regards the dowry and arras, and also with respect to the gains they had made; and not that of the place to which they had transferred their domicile" (Moreau & Carleton, Partidas, Vol. 1, pages 507-8, 532). The authors subjoin to the text a note of Gregorio Lopez, in which that Commentator

"observes that this law is to be understood in relation to goods acquired in the place where the marriage was contracted, and not in relation to those acquired in another territory to which the parties had gone, and where a contrary custom prevailed; because a custom does not extend beyond the territory where it is established, unless there was an express agreement to that effect between the parties; then it ought to be observed."

#### Laws of Toro.

We pass, next, to the laws of Toro, Leyes de Toro. In 1502, at the request of the Cortes of Valladolid, the Cortes assembled at Toledo, undertook a revision of the laws of Spain. This resulted in a compilation, containing 83 laws, which were published in a succeeding Cortes, the Cortes of Toro, in 1505. Hence the name, Laws of Toro. These laws, as Schmidt puts it (Civil Law of Spain and Mexico, Introductory History, Chapter V), "were all subsequently incorporated in the Nueva Recopilacion, and thence transferred to the Novisima Recopilacion."

#### Nueva Recopilacion.

The Nueva Recopilacion was compiled under the auspices of Philip II, and promulgated in 1567. It gathers up all pre-existing laws except those which had been superseded by Royal Ordinance and by the Laws of Toro. With few changes of importance, the Nueva remained the Code of Spain from 1567 until 1805.

#### Novisima Recopilacion.

Then came the Novisima Recopilacion, compiled by Don Juan de la Reguera Valdelomar, to whom the task of compiling the laws actually in force had been committed by Charles IV of Spain (Schmidt, loc. cit.).

The Novisima is composed of 12 books. Book 10 divides into 24 titles; treats of contracts and obligations in general; of betrothings, marriage, dowry, donations propter nuptias, community of acquests and gains, disposable portions, donations, loans, mayorazgos and other entails, of last wills, executors, inventories, vacant estates (Schmidt, loc. cit.).

The Novisima Recopilacion, and more particularly, for present purposes, the provisions above noted of Book 10, were made applicable to Spanish America by a provision of the Colonial legislation of Spain, known as Recopilacion de leves de los Reinos de las Indies, or, more shortly, Recopilacion de Indies. Philip II had ordered a collection of the colonial laws. The compilers made haste gently. It was not until May 18, 1680, in the reign of Charles II, that the Recopilacion de Indies was promulgated. It was not an exhaustive code—rather a political, military and fiscal digest of Royal Orders. Hence, by laws 1 and 2 of Title 1, Book 2, it was provided that where this Recopilacion has no provision on a given subject, the laws of Castille must be observed. The Spanish Civil Law was thus made part of the law of Spanish America (Schmidt, loc. cit.).

The Novisima Recopilacion, therefore, on the question in hand, became the law of Mexico; it has ever since been the law of Mexico; it is the law

there today. Mexico declared her independence, September 28, 1821. "The civil law of that country, with some few exceptions noted hereafter, is, in point of fact, hardly dissimilar from that of Spain". (Schmidt, Civil Law of Spain and Mexico, Introductory History, p. 99.)

Book X, Title IV, of the Novisima with its pertinent laws numbered from I to XIII, inclusive, is printed as an appendix to this brief (Appendix II, p. 128). It will be observed that each law is accompanied by a notation of the original source from which it was taken, whether from the Fuero Real. transferred into the Nueva, or from the laws of Toro, or from other original source, likewise transferred into the Nueva,-all gathered up into the Novisima. Take, for example, Law 1, of Title 4, Book X of the Novisima, in which the classical statement is repeated from the Fuero Real, pronouncing that everything the husband and wife may earn or purchase during their union, belongs to both by halves, and, in immediate juxtaposition, discriminating what is separate property of an individual spouse. We give first the Spanish original:

"LIBRO X. TITULO IV.
TITULO IV.

DE LOS BIENES GANANCIALES, O ADQUIRIDOS EN EL MATRIMONIO.

# LEY I.

Ley 1, tit. 3. lib. 3. del Fuero Real.

Modo de partir entre marido y muger los bienes
adquiridos en el matrimonio.

Toda cosa que el marido y muger ganaren o compraren, estando de consuno, hayanlo ambos por medio; y si fuere donadio de Rey o de otri, y lo diese a ambos, hayanlo marido y muger; y si lo diere al uno, hayalo solo aquel a quien lo diere. (ley 2. tit. 9, lib. 5 R.)" (R., in the closing reference, is the Nueva).

Now, for the English rendition:

# "LAW I.

Fuero Real, Law 1, titl. 3, lib. 3.

Mode of dividing between husband and wife the property acquired during marriage.

Everything the husband and wife may earn or purchase during union, let them both have it by halves; and if it is a gift of the King or other person, and given to both, let husband and wife have it; and if he give it to one, let that one alone have it to whom it may have been given (R. law 2, tit. 9, lib. 5.)"

(The translation is taken from the brief of Mr. Eugene Liés, in *Packard v. Arellanes*, 17 Cal. pages 529 et seq. See *Johnston v. S. F. Savings Union*, 75 Cal. 134, 143-4, where the Supreme Court says of this eminent lawyer, that he was one "who was well versed in Spanish law.")

Again, take Law II of the Novisima, distinguishing, in exact terms, between property common to husband and wife, and property belonging to each one for himself or herself:

# "LEY II.

Ley 2, tit. 3. lib. 3. del Fuero Real Bienes comunes a marido y muger, y los pertenecientes a cada uno por si.

Si el marido alguna cosa ganare de herencia de padre o de madre, o de otro propinquo, o de donadio de senor, o de pariente o de amigo, o en la hueste del Rey, o de otro que vaya por su soldada, hayalo todo quanto ganare por suyo; y si fuere en hueste sin soldada, a costa de si y de su muger, quanto ganare desta guisa, todo sea del marido y de la muger, ca asi como la costa es comunal de ambos, lo que dicho es de suso de las ganancias de los maridos, eso mismo sea de las mugeres. (ley 3. tit. 9. lib. 5. R.)"

# "LAW II.

Fuero Real, Law 2, tit. 3, lib. 3.

Property common to husband and wife, and that belonging to each one for himself or herself.

If the husband should earn anything by inheritance from father or mother, or other near relative, or by gift from lord, relation or friend, or in the army of the King, or of another in his pay, let him have everything he may earn for himself; and if he be in the army without pay, at the expense of himself and his wife, whatever he may earn in this way, be it all the husband's and wife's; for even as the cost is common to both, let what they may earn in that way be common to both. What above is said of the earnings of husbands, let the same be as regards those of wives. (R. Law 3, tit. 9, lib. 5.)"

Note, again, Law III of the Recopilacion, in which "bienes propias," or the separate property of husband or wife, is distinguished, with precision, from "bienes comunes," or the common property of both:

# "LEY III.

Ley 3, tit. 3. lib. 3. del Fuero Real.

Los frutos de los lienes propias del marido o de
la muger sean comunes.

Maguer que el marido maya mas que la muger, o la muger mas que el marido, quier en heredad quier en mueble, los frutos sean comunes des ambos a dos; y la heredad, y las otras cosas do vienen los frutos, hayalas el marido o la muger cuyas antes eran, o sus herederos. (ley 4. tit. 9. lib. 5. R.)"

## "LAW III.

Fuero Real, Law 3, tit. 3, lib. 3.

Let the fruits of the separate property of the husband or of the wife be common.

Although the husband may have more than the wife, or the wife more than the husband, in real estate or in personal, let the fruits be common to both; and let the realty or other things whence the fruits proceed go to the husband or wife who owned them before, or the heirs of him or her. (R. Law 4, titl. 9, lib. 5.)"

Law IV of the Novisima applies the presumption of community property to all property which husband and wife have; it declares that the property which the husband and wife have belongs to both by halves; and it takes, with exactness, the discrimination between that property, upon the one hand, and, on the other, property which belongs to the one or the other separately:

# "LEY IV.

Ley 203. del Estilo; y D Felipe II, ano de 1566.
Los bienes que tengan el marido y muger se presuman comunes, no probando su respectiva pertenencia.

Como quier que el Derecho diga, que todas las cosas que han marido y muger, que todas se presumen ser del marido, hasta que la muger muestre que son suyas; pero la costumbre guardada es en contrario, que los bienes que han marido y muger, que son de ambos por medio, salva los que probare cada uno que son suyos apartadamente; y ansi mandamos, que se guarde por ley. (ley 1, tit. 9. lib. 5. R.)"

# "LAW IV.

Law 203 of Estilo and Philip II, the year 1566. Let the property which husband and wife have be presumed common, its respective ownership not being proved.

Albeit that the law may say, that all things which husband and wife have are all presumed to belong to the husband, until the wife shows that they belong to her; nevertheless, the custom observed is on the contrary, that the property which husband and wife have belongs to both by halves, except that which each one may prove to be his separately; and so we order that it be observed as a law. (R. Law 1, tit. 9, lib. 5.)"

It will be seen, on comparison of Law IV with Law I, that Law IV repeats the terms of Law I declarative of the community property of husband and wife, in distinction from the separate property of husband or wife, and then goes on to enforce the community estate by super-adding the presumption that, in the absence of proof otherwise, the property which husband and wife have, shall be taken to be the common property of both. It was from this law, Law IV of Title 10 of Book 4 of the Novisima Recopilacion that this court, in Arnett v. Reade, 220 U. S. 311, 319, took the language fundamental to the community property system of Spain: "Los bienes que han marido y muger que

son de ambos por medio"; (The property which husband and wife have belongs to both by halves)—citing Novisima Recopilacion, Book X, Title IV, Law IV.

Law V, set out in terms in the Appendix, after reaffirming the distinction between the common property and that pertaining to husband or wife—"Bienes comunes, y los pertenecientes a marido o muger"—places the management and disposition of the common property in the hands of the husband, subject, however, to the essential qualification that, in dealing with the common property, he shall not act fraudulently to defraud or injure the wife. In a word, his power of disposition, is subjected, in recognition of the common ownership of the wife, to the responsibilities of an agent and trustee. Without repeating the original Spanish, given in the appendix, the translation runs:

"And likewise (it is declared) that the property earned, improved, and multiplied during the marriage between husband and wife, not being military or semi-military, may be alienated by the husband during the marriage, if he will, without license or conveyance of his wife, and that the contract of alienation be valid, save it be proven that it was done fraudulently to defraud or injure the wife."

This provision of the law, protecting the interest of the wife, goes back to the reign of Don Enrique IV, at Nieva, the year 1473, pet. 25; passes thence into Law V, Title IX, Book V, of the Nueva Re-

copilacion; and thence into Law V, Title X, Book IV of the Novisima (Appendix p. 133).

Laws VI and VII of the Novisima deal with the obligation of the surviving consort to reserve to the children of a given marriage, such property as the survivor has received from the deceased spouse in the way of dowry or donatio, in distinction from gananciales, as explained in the partidas to which we have made reference, and such property as may have been inherited by the survivor from the children of the given marriage. But these same laws provide explicitly that the surviving consort "may dispose freely" of his or her share of the ganancials, or common estate, "without being obliged to reserve to such children the ownership or the usufruct of the said property." It was a misapprehension and pretermission of this distinction between the two classes of property, that led to the error of Panaud v. Jones, 1 Cal. 488, so carefully pointed out and explained in the leading case of Thompson v. Cragg, 24 Tex. 582. The discussion in Thompson v. Cragg is set forth in the Appendix, p. 211, to this brief.

Law VIII, taken from Law XV of Toro, and appearing in Law VII, Title 9, Book 5 of the Nueva, thence transferred into the Novisima, provides, as was afterwards declared in Beard v. Knox, 5 Cal. 252, and succeeding California cases, that property left to the wife by last will and testament of the husband, is not to be reckoned against her half of the gananciales. It is a disposition to

her by the husband out of the half which belongs to him, not of property which she already owns (Appendix p. 137).

Law IX (Appendix p. 138) provides that the wife may renounce the gananciales, in which event, she is not liable for any part of the debts which the husband has contracted during the marriage. This law passes from Law 60 of Toro, into Law IX, Title 9, Book 5 of the Nueva, thence into the Novisima.

Law X (Appendix p. 139) deals with the effect of crime of either spouse upon the community property, the multiplied or ganancial property. It determines two things: First, that the property, in such an event, maintains its character as ganancial, notwithstanding the actual commission of the crime, until the sentence has been declared, or, as we should say, until the judgment is entered. And this, although the crime be such as "imposes the penalty *ipso jure*."

This law, first declared as Law 77 of Toro, becomes Law X of Title 9, Book 5 of the Nueva, and thence passes into the Novisima. It is entitled: "Neither of the consorts, for the crime of the other, shall lose the property increased (los bienes multiplicados), until the declaratory sentence." The body of the law reads:

"On account of the crime which the husband or the wife may commit, though it may be heresy, or of any other nature,—let not the one, by reason of the other's crime, lose his

own property, nor the half of the earnings (ganancias) got during the marriage; and we order that all the increase during the marriage be held as bienes de ganancia until, for such crime, the property of either of them be declared by sentence, and this although the crime be of nature that imposes the penalty ipso jure."

No corollary could be more obvious, no recognition more telling, of the fundamental law of the community, "los bienes que han marido y muger, que son de ambos por medio," Law IV of the Novisima, supra, Arnett v. Reade, 220 U.S. 311, 319. The husband commits a crime, which the law of Spain visits with the forfeiture of his property. That strikes at his ownership of ganancial or common property. There is an innocent wife. The Spanish law does not impute to the innocent wife the guilt of her husband, or the consequences of that guilt in its bearing upon property. It recognizes that the husband has a half ownership in the gananciales, it takes that half from him. It recognizes that the wife, as well, has a half ownership in the same property; it exempts her half from the consequences of the criminal act of her husband, agent, and trustee, even as it safeguards that half from the consequences of his fraud; it puts her in absolute control, dominio pleno, and unqualified possession, of her half of the community estate. It protects the innocent.

Law XI (Law 78 of Toro, Law XI of Title 9, Book 5 of the Nueva, thence transferred into the

Novisima), provides that the wife, on her part, "may, by reason of crime, lose in part or in whole her dowry and earnings, or other property, of whatever nature it may be." Law XII approves the extension, theretofore granted by "the law of Baylio" to the village of Albuquerque, founded by Alfonso Tellez, son-in-law of Sancho II, King of Portugal, "according to which all of the properties which the married acquire by any means, be communicated, and subjected to partition, as ganancials." And the same rule is made to apply to "other pueblos, where it has been observed until now." And finally, Law XIII abolishes the custom in the City of Cordoba, according to which married women had been denied any "part in the ganancial properties acquired during the marriage"; and the community system is extended to the women of Cordoba (Appendix p. 142).

Such is the law, such is the policy of the Spanish community system.

"It is a misconception of that system to suppose that, because power was vested in the husband to dispose of the community property acquired during marriage, as if it were his own, therefore by law the community property belongs solely to the husband. The conferring on the husband the legal agency to administer and dispose of the property involved no negation of the community, since the common ownership would attach to the result of the sale of the property."

Warburton v. White, 176 Cal. 484, 497.

And, again, in the same case, pp. 494-5, this court speaks of

"the features essentially inhering in what is denominated the community system-that is, that property acquired during marriage with community funds became an acquest of the community, and not the sole property of the one in whose name the property was bought, although by the law existing at the time, the husband was given the management control and power of sale of such property. This right being vested in him, not because he was the exclusive owner, but because by law he was created the agent of the community. The proceeds of the property, when sold by him, becoming an acquest of the community, subject to the trust which the statute imposed upon the husband, from the very nature of the property relation engendered by the provision for the community."

In Arnett v. Reade, 220 U. S. 311, 319, this court, referring to the statement that the wife has a mere expectancy, goes on to say:

"The statement also directly contradicts the conception of the community system expressed in Warburton v. White, 176 U. S. 484, 494, that the control was given to the husband, 'not because he was the exclusive owner, but because by law he was created the agent of the community,' and notwithstanding the citation in Garrozi v. Dastas, 204 U. S. 64, of some of the passages and dicta from authors and cases most relied upon by the court below, we think it plain that there was no intent in that decision to deny or qualify the expression quoted from Warburton v. White."

This power of disposition and management is not conferred by the law on the husband

"in recognition of any higher or superior right that he has therein (in the community estate), but because the law considers it expedient and necessary in business transactions affecting the personalty (in Arizona, as in California, the concurrence of the wife as a party is required, in the sale or encumbrance of real property) to have an agent of the community with power to act. So it has clothed the husband with this agency, deeming him the best qualified for the purpose, but limiting such agency to the personalty, and during the period of the coverture. And this agency to dispose of the community personalty may not be exercised by the husband to defraud his wife, for in one way or another she would have a remedy for a disposition by the husband in fraud of her rights, or made with the intent and purpose of defeating her interest."

(This latter language is borrowed almost literally from *Arnett v. Reade*, supra.)

"And further, this power of the husband to dispose of the personal property of the community, is limited to the period of coverture, and does not extend to his disposal thereof by will, but he is restricted in the disposal by will to his one-half thereof."

La Tourette v. La Tourette, 15 Ariz. 200, decided January 2, 1914.

New Mexico, like Arizona, derived its community property system from the Spanish-Mexican law. The Supreme Court of New Mexico, as pointed out by the Attorney General in his opinion of February

26, 1921, T. D. 3138, "carefully reviewed the history of the community property system in New Mexico," in *Beals v. Ares*, 185 Pac. 780, decided November 29, 1919. The conclusion of that court is stated by the Attorney General:

"That under the law in this jurisdiction, the wife's interest in the community property is equal with that of the husband; that, while he is by statute made the agent of the community, and given dominion and control over the community property during the continuance of the marriage relation, his interest in the property, by reason of such fact, is not superior to that of his wife."

The Spanish Law of Community, therefore, upon its face, and speaking for itself, establishes as "the features essentially inhering in what is denominated the community system": First, that the wife's interest in such property is equal with that of the husband; and second, that while the husband, on considerations of expediency, is made the agent of the community, "and given dominion and control over the community property during the continuance of the marriage relation, his interest in the property, by reason of such fact, is not superior to that of his wife."

And, indeed, under Spanish and Mexican law, where these considerations of expediency failed, the agency of the husband was displaced for that of the wife. Where the marriage is "contracted under the laws of Spain" it appears

"that the rights and duties of the husband are reciprocal. If he be vested with high powers,

he is subject to corresponding duties. As the land in question may be taken, at least for this inquiry, as a portion of the community acquisitions, our attention will be directed to the rights and obligations of the husband and wife in reference to such property. The rights of property in the effects of the community are perfectly equivalent to each other. The difference is this, that during coverture her rights are passive, his are active. He has the free administation and disposition, if untainted by fraud against his wife, of such property; and he is subject to the corresponding duty of maintaining his wife and family, and defraying out of this property the debts contracted before marriage. So long as he discharges his duty as a husband, his superior rights remain unquestionably in full vigor. But when he abandons the administration of the common property, deserts his wife and country, when he ceases the discharge of his duties, and contributes in no mode to the support of his wife and family, reducing the wife to the necessity of providing for them, and of taking care of the common property, or otherwise suffering it to go to waste; and when this absence is prolonged several years,-do not his rights over the effects of the community, from the nature of things, cease, and are not the passive rights of the wife quickened into vigorous activity?

"She is necessarily compelled to assume the position of the husband, to discharge his duties and incur his responsibilities; and her power should correspond to the position, by the default of the husband, she is thus compelled to assume; and especially should the controlling power of the husband be transferred to the wife. Her right in that property is equal to that of the husband. During his presence, he has the administration, subject to the trusts incumbent upon the property. This right of control

must necessarily cease where he can and will no longer exercise it; and the wife, the other joint owner, must be vested with the authority, or it cannot exist anywhere."

Wright v. Hays, 10 Tex. 130.

#### Novisima Sala Mexicana.

The Civil Law of Mexico, as noted above, (Schmidt, Civil Law of Spain and Mexico, supra) "is, in point of fact, hardly dissimilar from that of Spain." In the appendix to this brief (Appendix p. 144) we have printed the pertinent excerpts from "Novisima Sala Mexicana," in the original Spanish and in the English translation. Under Section 2a, Title 4, Volume 1, entitled: "Of the Civil Effects of the Marriage," it is said:

"The marriage produces some legal effects which we proceed to explain. The first is the authority which the parents have over their children, of which we have treated in the preceding title. The second, which is treated of entirely in Title 9 of Book 5, of the Recopilacion (Nueva), or Title 4 of Book 10 of the Novisima, and which was unknown to the Roman law, is the acquisition by both consorts in halves of what each of them gained during the marriage; so that all of the property which the husband and wife may have belonged to both equally, excepting those which either of the two may prove belongs to him or her separately. Thus they are presumed to be community, if they are not proved otherwise, and upon this is founded the necessity or convenience of executing a public instrument at the time of contracting marriage, in which are set forth the properties which each one brings."

Section 5: "The dominion of the gananciales is common equally in halves to the husband and wife (citing Law I and Law IV of Title 4, Book 10, of the Novisima), without consideration as to whether one brought more property than the other into the marriage."

The commentators are then referred to, "Matienzo opines that this communion of property is as concerned the dominion and the possession, but Covarrubias and Acevedo say that, as regards the wife, it should be understood as an habitual dominion and possession, and not actual, which latter she does not acquire except by the dissolution of the marriage, during the existence of which it is only of the husband, and, therefore, he can convey the properties of the company without necessity of the consent of the wife, unless it is made with the intention to defraud or injure her." Whether the husband can exercise this power of disposition to the extent of giving away the community property, has been disputed among the commentators, but "Molina and Gutierrez take a middle course, which appears to be the most correct, and is, that the husband can make moderate donations, not excessive, and without cause."

It may be observed, that this "middle course, which appears to be the most correct," was the course taken by the Supreme Court of California, in *Lord v. Hough*, 43 Cal. 581, decided in April, 1872, long prior to the Amendment of 1891 (Stats. 1891, p. 425) to Section 172 of the Civil Code of

California, providing that the husband "cannot make a gift of such community property, or convey the same without valuable consideration, unless the wife, in writing, consent thereto."

In Section 6 of the Novisima Sala Mexicana, it is said that "the husband cannot convey in his will the gananciales which pertain to his wife, who rather enters by the death of her husband into the free administration of the half which belongs to her." And in Section 8, speaking of the liquidation of the matrimonial partnership, it is said that "there are deducted the charges or debts; and, in the legal company, the dowry of the daughters, and the donations propter nuptias to the sons, are reputed as such; and should, therefore, be taken out of the gananciales, whether they are given or promised by both, or by the husband alone."

It is said in Section 9, "that the husband can give license to his wife to contract, and do all that, without the same, she could not do, and that the same being given to her, all that she may do by virture thereof is valid." It is next pointed out that the agency of the husband may be displaced, on sufficient cause, in favor of the wife. "If the husband does not give it (license to the wife to contract), it shall be given by the judge, who may give the same, also, upon hearing of cause, the husband being absent and his return not soon expected, or there being danger in the delay; and all that is done under the license of the judge shall be valid, the same as if the husband had given it."

## The Commentators-Escriche.

So much, then, for the Spanish and Mexican law of the community system, speaking for itself. Res ipsa loquitur. Among the decisions of the courts, references will be found, from time to time, to the Spanish Commentators—to Escriche, inter alios, regarded as one of the more reliable (Mr. Justice Abbott, in Reade v. DeLea, 95 Pac. 131, 140-141; S. C., Sub. nom. Arnett v. Reade, 220 U. S. 311). In the "Elements of Spanish Law", by Don Joaquin Es-(1840), translated by Bethel Coopwood criche (1886), from which we have excerpted pertinent passages, set out in the appendix to this brief (Appendix p. 158), it is said that the community "is a certain legal society which is established between the consorts, whereby all the ganancial property is made common to both by halves, although one may have brought more capital than the other." For this, the Commentator cites the laws of the Fuero Real and of the Novisima Recopilacion, to which we have made reference. The ganancial properties, he goes on, are "all those which the husband and the wife, or either of them, during the matrimony, and living together, acquire by purchase or by means of their labor and industry; as also the fruits of the separate property each brought to the matrimony, and of those they acquire, per se, by any lucrative title, as inheritance, legacy, or donation". For this, the Commentator again makes reference to the Fuero Real and to the Novisima Recopilacion, specifying the particular laws to which we have called attention. "The dominion", he says, "in this property is common to both during the society, but only the husband can alienate it while both are living—even without the consent of the wife, provided he does not do it with intent to injure her". His references are to Laws 1, 4 and 5 of Title 4, Book 10, of the Novisima, which we have particularly noticed, and to the commentators Molina and Gutierrez.

Escriche is the compiler of "Diccionario Razonado de Legislacion y Juris Prudencia". In the appendix to this brief (Appendix p. 161), we have quoted the pertinent paragraphs from Tomo 2, pages 86 et seq. This compilation is referred to by Mr. Justice Abbott in Reade v. DeLea, supra, as Escriche's "very comprehensive Dictionary or Encyclopedia of Law." Escriche describes the ganancial properties, practically in terms, as they are described above in his "Elements of Spanish Law". He goes on to say:

"All that the husband and wife gain is common to both. 'All things that the husband and wife gain or purchase, they being together, (estando en consuno) says Law I, Title 5, Book 3 of the Fuero Real (carried into the Novisima, as we have noted heretofore) belong to both in halves.' 'Even though the husband has more than the wife, or the wife more than the husband, whether in land or in movables, the fruits shall be common to both in halves. (Citing the laws above mentioned from the Novisima)."

# Again:

"The husband and the wife have the dominion of the ganancial properties, Laws I and IV,

Title 4, Book 10, Nov. Rec., with the difference that the husband has it in custom (habito) and in act (acto), as the authors explain, and the wife only in custom (habito), the act (acto) passing to her when the marriage is dissolved. For that reason, the wife cannot give nor convey said properties during the marriage, but the husband can, without the consent of the wife, make their inter vivos conveyances moderately for just causes; but the excessive or capricious gifts will be null; and the conveyances made with intent to defraud the wife; -- who will have action in all these cases, against the properties of the husband and against the possessor of the thing conveyed". (Citing Law V, Title 4, Book 10, Nov. Rec.; and the Commentators Molina and Gutierrez.)

"The ganancial properties", he continues, "are in common of the husband and the wife, and belong to each of them in half, even though the husband has more private property than the wife, or the wife more than the husband; even though one gains more afterwards than the other; and finally, even though one only may acquire them, trafficking or working. Because, by virtue of the marriage, there is established between the consorts, a legal company, different from the others, whereby their acquisitions are reciprocally communicated to them; Laws I, II, III, and IV, Title 4, Book 10, Nov. Rec."

Escriche notes the rule of Spanish law to which we have made full reference, that "this communication or communion of properties ceases when the properties of one of the consorts is confiscated; but neither loses his or her part of the gananciales for the crime of the other"; citing Laws X and XI,

Title 4, Book 10, of the Novisima to which we have already called attention.

"The ganancial properties", says Escriche, "are made common from the time that the marriage is contracted until it is dissolved."

## And further:

"The wife, upon the death of the husband, acquires the full ownership and the administration of the half of the gains made in the marriage, and may freely dispose of the same, either by contract inter vivos, or by will, without the obligation to reserve the same for the children of the marriage, Law 14, Toro; provided that, in the testamentary disposition, she does not injure the heirs in their estate. (That is, as we have already seen, in such estate as derives from dowry, donatio propter nuptias, or, in Spanish, the arras). In the same manner can the husband dispose of his half of the ganancial properties, without obligation to reserve the same for said children; Law 14, of Toro."

It was, as we have remarked, by missing this distinction, and in the erroneous inclusion of ganancials within the obligation to reserve, that the court, in *Panaud v. Jones*, 1 Cal. 513, fell into the error, clearly exposed in *Thompson v. Cragg*, 24 Tex. 582.

#### Febrero.

Febrero, the Spanish notary, was an earlier compiler, belonging to the eighteenth century. He is the Febrero in reference to whom it was said by Mr. Justice Abbott (*Reade v. DeLea*, 95 Pac. pp. 140-141; S. C., sub. nom. *Arnett v. Reade*, 220 U. S. 311), in the way of comparison, that Escriche was "a more reliable authority". Febrero compiled what

he called Libreria de Escribanos, Library of Notaries, from which we present, in the appendix to this brief (Appendix p. 176) pertinent extracts, taken from Book 1, Chapter 4, §1, page 237, et seq.

He quotes Law II, Title 9, Book 5, of the Nueva Recopilacion: "All things that the husband and the wife gain or purchase, being together, shall be had by both in halves; and if they be a gift of the King, and they be given to both, they shall be had by husband and wife; and if given to one, they shall be had only by the one to whom they are given. Which," he goes on to say, "was to the contrary under the old law, as all the properties were presumed to belong to the husband, and the wife had only those which she proved to be hers". And again: "All that one or the other, or both, gain, should be communicated and divided in half." And further: "The same applies, whether gained by both, or one only, during the marriage, because though one may not work at all, such one would not therefore be unable to participate in the profits, as for this sole purpose, through the legal concession, they are partners in universal partnership."

He states the law to be "that the properties had by husband and wife, belong to both by halves, except those that each proves to be his or hers separate"." He further tells us that the gananciales "are at all events communicated to them in the manner expressed, because attention is paid to the *time* of its acquisition, and not to the person in whose name the

sale is made, and they appear as purchased. "The profits and fruits of the usufruct of furniture or land which one of them took into the marriage in property," he adds, "are also equally communicated between the husband and wife." He points to "the fundamental reason of the law for them to participate" in the gananciales, as being the contribution of the two consorts to the production thereof,—what Mr. Justice Field, in Meyer v. Kinzer, 12 Cal. 248, 252, characterized as the theory of the California Statute of 1850, "borrowed from the Spanish law", namely, "that the marriage, in respect to property acquired during its existence, is a community of which each spouse is a member, equally contributing by his or her industry to its prosperity".

Even a gift, if it be "remuneratory", is communicated, not to the actual donee, but to "the married persons". As Febrero explains it, "there is also communicated to the married persons, the remuneratory gift which is made to them during marriage, for the services or merits rendered in this time; because it is not properly a mere and pure lucrative donation, but satisfaction for work done or benefit received". What the husband acquires in war, in remuneration of his services, "will be communicated to both spouses". The point is, that what he gains "at his expense and that of his wife, whatever he gains in this manner, all shall belong to the husband and to the wife; because, as the expense is common to both, what they thus gain, shall be common to

both". And further, whatever the husband "saves of his salary outside of campaign, whether or not he be pensioned, or retired from the service, and whatever he purchases and gains therewith, shall be communicated to both". In the same way, "Whatever the husband acquires in the war is communicable to the wife in the case proposed, so also is what he gains with the offices of judge, lawyer, notary, and others similar, during the marriage; as these offices are quasi castrenses (semi-military), and whatever they produce are fruits which, whatever their nature may be, belong to them in halves". Again, "the increase of the slaves of either of the consorts are communicable between both, because they are comprised under the generic name of incomes, and these, whether proceeding from the properties of one of them, or both, are communicable to them without distinction".

The equity and justice of applying the community rule of a legitimate marriage, to a marriage merely putative, entered into by the parties in good faith, without knowledge of its invalidity and nullity, are enforced in the text of Febrero. "Not alone," he says, "in the legal and true marriage, are the properties which they gain with their industry and work while it exists, communicated to the married parties, but also such as they acquire during the putative marriage, provided that they have good faith and ignorance, and believe that it is legitimate, and not otherwise". This rule of manifest fairness was vig-

orously enforced by the Supreme Court of California, in the quite recent case of Schneider v. Schneider, 183 Cal. 335, to which we shall have occasion to return.

Febrero, then, whatever comparisons may be made as to his reliability, is seen to be in substantial, and even in literal, accord with the pronouncements of authentic Spanish law, from the time of the Fuero Real to that of the Nueva Recopilacion, and down to the time when Febrero wrote, and in accord, as well, with the later compilation of the Novisima. which came after him. There is a doubtful or mistranslated passage in Febrero's Libreria, which made trouble in the misconceived case of Panaud v. Jones, 1 Cal. 513, already mentioned, and contributed to the error, the "expectancy" error, of Spreckels v. Spreckels, 116 Cal. 339; which, again, was examined and criticised by Mr. Justice Abbott, in Reade v. DeLea, 95 Pac. pp. 140-141, and which received the comment of this court in Arnett v. Reade, 220 U.S. 311, 319-320. The passage runs, in the original Spanish:

"A la mujer casada se comunica y transfiere en habito y potencia el dominio y posesion revocable y ficta de la mitad de los bienes que durante el matrimonio gana y adquiere con su marido; mas despues que este fallece, se le transfiere irrevocable y efectivamente, de suerte que por su fallecimiento se constituye duena absoluta en posesion y propiedad de la mitad que deje, al modo que en los socios convenciales lo dispone la ley. Por este a la mujer no solo

la esta prohibido donar sus lienes dotales y gananciales durante el matrimonio, sino tambien dar limosna sin licencia de su marido, excepto en cuatro casos \* \* \* El marido no necesita la disolucion del matrimonio para constituirse real y verdadero dueno de todos los gananciales, pues durante este tiene en el efecto su dominio irrevocable asi los piede administrar, trocar, y no siendo castrenses ni cuasi castrenses, vender y enagenar a su arbitrio, cesanta el doloso animo de defraudar a su mujer, como se prueba de la ley."

The first part of this passage is thus translated by the Supreme Court of California, in *Fuller v. Ferguson*, 26 Cal. 547, 566:

"To the married woman is imparted and transferred by usage and legal authority (en habito y potencia) the dominion and possession, revocable and fictitious (Mr. Justice Abbott, supra, translates the Spanish adjective 'ficta', 'nominal'), of the one-half of the property which during the marriage she gains and acquires with her husband; but after he dies, the same passes to her irrevocably and effectively, so that, after his death, she becomes the absolute owner in possession and property of the onehalf which he leaves, in the manner prescribed by law, between conventional partners. For this reason, the wife is prohibited not only from giving away her dotal (which, in distinction from the income thereof, was the wife's own property, as Febrero himself points out) and ganancial property during the marriage, but also from giving alms without the license of her husband, except in four cases," which four cases, the court says, "it is not necessary to mention".

Now, then, Mr. Justice Abbott, in his opinion supra, speaks of Febrero, and of the mistranslation to which he has been subjected, in language which, evidently, had the appreciation of this court in Arnett v. Reade, supra. "There is", he says, "so far as I can learn, no authoritative translation of Febrero's treatise. It is clear that the translation used in Panaud v. Jones, is,

"in some important particulars, incorrect, and in others, the meanings attributed to Spanish words are not necessary ones. Thus, 'que este fallece' may mean, and, according to Escriche, infra, a more reliable authority, should be, not the death of the husband, but the expiration of the marriage community, a very important difference. The adjective 'ficta', which is translated 'feigned', has also the meaning 'artificial', and corresponds fairly to our word 'nominal'. 'Dueno', translated 'owner', has also the meaning 'master'. Judging from the fact that Escriche, in his very comprehensive Dictionary or Encyclopedia of Law, does not define or even mention it, the word has no established and recognized meaning in Spanish law, and was used loosely in the statement under consideration. The word 'dominio' is here rendered 'dominion', and properly so, I think, but in Guice v. Lawrence, (the early, now obsolete case from 2 La. Ann. 226, a mere reference to which seems to have been the basis of the unhappy 'expectancy' dictum of Van Maren v. Johnson, 15 Cal. 311), the word 'ownership' is used as its equivalent. In the brief for the appellee, the latter meaning is given to it in a citation from Escriche, with the effect of converting the citation into an authority for the appellee, from one against him as it seems really to be. The citation, leaving

that word in the original, is as follows: 'The husband and wife have the *dominio* of the acquest property, with the difference that the husband has it nominally and in fact, and the wife only nominally; the fact becoming effective when the marriage is dissolved'. Escriche, Dic.

Raz. de Leg. y Jur., Tomo. 2, p. 86.

"The real meaning of the word 'dominio', becomes, therefore, a matter of perhaps decisive importance. If its meaning is not, in that connection, ownership, but dominion, right of control and disposition, then Febrero and the cases founded on his authority, do not aid the appellee's contention, and Escriche is distinctly against it. That the latter, rather than the former, is its ordinary meaning, the dictionaries inform us. Its meaning, as used in law, is given in the Cyclopedia of Law and Procedure as: 'The right or power to dispose freely of a thing, if the law, the will of the testator, or some agreement, does not prevent'. That definition is taken from the remarkable case of United States v. Andres Castillero, which occupies almost half of the second volume of Black's Reports, 2 Black, 17.

"Justice Wayne adopted and incorporated entire, in his dissenting opinion, the opinion of Judge Ogden Hoffman, the District Judge, from whose judgment the case was appealed, 'as the best way of expressing my appreciation of the law and the merits of the case, and of his judicial learning and research in connection with it'. Mr. Justice Catron, who, with Mr. Justice Grier, also dissented, spoke in even higher terms of praise of Judge Hoffman's learning. In Judge Hoffman's opinion, as adopted by Justice Wayne, on pages 226, 227, of the volume named, occurs the definition referred to, and, in connection with it, a discussion of various Spanish

terms, employed to describe different interests in real property, quoted from Spanish writers. The opinion shows that 'dominio' alone has the meaning already given, adopted by the Cyclopedia. Other words are added when it is desired to express full and complete ownership, as 'dominio pleno y absolute', or 'con el dominio y propriedad'. meaning 'with the right of disposition and property',-making the two elements of ownership distinct. While it is true that the opinion of Judge Hoffman did not prevail with the majority of the Supreme Court, there was nothing in the decision of that tribunal to detract from the encomiums on his learning by the dissenting justices, and the definitions he gives are, besides, cited from Spanish law writers of the highest repute.

"It is not claimed," Mr. Justice Abbott continues, "that the right of the wife to dominion and possession of half the community property was not revocable and artificial-or, as we should say, determinable or defeasible and nominal-during marriage, nor that the husband was the real master of the community and its property. All that might be consistent with her having a proprietary interest in it,—which other expressions of the Spanish and Spanish-Mexican treatises abundantly indicate that she had. Thus it is said in Novisima Sala Mexicana, Section 2a, Title 4, that a feature of marriage is 'the acquisition, for both spouses, by the halves, of that which each may gain during the marriage; so that all the property which the husband and wife may have, belongs to both, onehalf to each, minus that which either may prove to belong to him separately'. Ballinger says (pages 384, 395), quoting from Schmidt's Civil Law: 'The law recognizes a partnership between the husband and wife, as to the property

acquired during marriage. \* \* \* Husband and wife are entitled to an equal share in the community, although one of them should, at the time of marriage, have been without any means. At the same time, both are liable, in equal proportions, for the losses and debts during its existence.' And of like tenor are all the statements I have found from similar sources, as to the effect of marriage in making the gains of the parties to it their common property.

"Indeed, the very expression 'community property' is a misnomer if that is not the case; all the learned treatises on it are little better than waste paper, and the celebrated chapter on the natural history of Iceland, 'Concerning Snakes,' might have been substituted for them with great gain in brevity and not much loss

in substance."

Referring to the opinion from which he was dissenting, Mr. Justice Abbott says:

"All that the decision of the court leaves of the system might have been expressed in a half dozen lines-that, if the wife survive the husband, she shall have a certain share of the property of which he dies possessed, which they gain during their marriage by onerous title. That it was something substantially more than that, is shown by the fact that the wife's half was subject to confiscation without affecting the half of the husband. (Citing Ballinger and Escriche.) Surely that which is non-existent, or exists only as a mere expectancy, if at all, cannot be reached by a present act of confiscation. Equally significant is the fact that on the decease of the wife, half of the community property, subject to the payment of its debts, etc., went to her heirs. If, up to the moment of her death, her husband was the owner of it, how could it thereupon become a portion of her estate, subject to the law of descent? And finally, that the husband's power of alienation was that of an agent or trustee, and not that of an owner, is manifest from the fact that the wife's interest in the proceeds of a sale made by him of community property (as had already, we beg to interpolate, been pointed out by this court in Warburton v. White, supra), was the same as in the property itself. In that respect, her interest differs fundamentally from a wife's right of dower, which does not attach to the proceeds of the sale of the land in which the inchoate right existed."

Referring to the "expectancy" dictum of the California case of *Van Maren v. Johnson*, 15 Cal. 308, Mr. Justice Abbott says:

"Until the interest of an heir in the estate of an ancestor who survives him, will pass by his, the heir's, will, or descend to his heirs (the wife's half descended to her heirs under the California statute of 1850, and now passes by her will under the Civil Code of Californiawe beg to interject), the similarity declared in Van Maren v. Johnson, supra, lacks much of a complete likeness. Rather," Mr. Justice Abbott says aptly, "is her interest like that of a minor under guardianship, whose ownership is complete, although his property is subject to control and alienation, as the law provides, but who has, in general, no power in himself either to manage or sell it, and will never have such power, unless he happens to live to the age at which the law admits him to that right."

This case of Reade v. DeLea, came to this court under the name of Arnett v. Reade, 220 U. S. 311, 318-320. The opinion of this court, if we may be

permitted to say so, is an object lesson of the multum in parvo. The New Mexico statute provided that half the community property, in the event of the wife predeceasing the husband, should descend to her heirs. That was the provision of the California statute of 1850. Later, the California legislature, in the exercise of the settled power of the sovereignty over the devolution of property post mortem, directed that, upon the death of the wife, not before her death, but at her death, the whole community property should then belong to the husband; and later, again, the same legislature subjected half the community property to the testamentary disposition of a wife predeceasing her husband. If half the community property, in the case of the predeceased wife, belongs, on the event of her death, to the husband, making up, with the other half, the whole of the community property; or if half of the community poperty, in such event, passes to the heirs of the predeceased wife,-it is not easy to comprehend that she had but the mere expectancy of an heir-a thing which the California statute says, is no interest at all. As Mr. Justice Holmes said, tersely, in Arnett v. Reade, supra:

"If the wife had a mere possibility, it would seem that whatever went to the husband from her so-called half, would not descend from her, but merely would continue his."

It may seem strange, but in a California case, Burdick Estate, 112 Cal. 387, an "expectancy" case, the

forerunner of *Spreckels v. Spreckels*, 116 Cal. 339, written by the same judge, it was said that the husband succeeded to this "expectancy" as the heir of his predeceased wife.

It is said by Mr. Justice Holmes—most happily and precisely, we presume to think—

"The notion that the husband is the true owner is said to represent the tendency of the French customs. 2 Brissaud, Hist. du Droit Franc., 1699, n. 1. The notion may have been helped by the subjection of the woman to marital power; 6 Laferriere, Hist, du Droit Franc., 365; Schmidt, Civil Law of Spain and Mexico, Arts. 40, 51; and in this country, by confusion between the practical effect of the husband's power, and its legal ground, if not by mistranslation of ambiguous words like dominio. See United States v. Castillero, 2 Black 1, 227. However this may be, it is very plain that the wife has a greater interest than the mere possibility of an expectant heir. For it is conceded by the court below and everywhere, we believe, that in one way or another she has a remedy for an alienation made in fraud of her by her husband. Novisima Recopilacion, Book 10, Title 4, Law 5. Schmidt, Civil Law of Spain and Mexico, Art. 51. Garrozi v. Dastas, 204 U. S. 64, 78. We should require more than a reference to Randall v. Krieger, 23 Wall. 137, as to the power of the legislature over an inchoate right of dower, to make us believe that a law could put an end to her interest without compensation consistently with the Constitution of the United States. But whether it could or not, it has not tried to destroy it, but, on the contrary, to protect it. And as she was protected against fraud already, we can conceive no reason why the legislation could not make that

protection more effectual by requiring her concurrence in her husband's deed of the land."

So much for the first part of the doubtful passage from Febrero. The second part of the passage, following in immediate sequence upon the first, is thus translated by the Supreme Court of California in *Fuller v. Ferguson*, 26 Cal. 547, 566:

"A dissolution of the marriage is not necessary to constitute the husband the real and true owner of the property acquired after marriage, for, during it, he has, in effect, the irrevocable dominion thereof, and thus he can manage, barter, and—even though they be neither military earnings nor quasi-military earnings-can sell and alienate the same at his pleasure, in the absence of an intent to defraud his wife, as may be proved by law. Wherefore, while the husband lives, and there is no divorce or dissolution of the marriage, the wife ought not to say that she has any gananciales, nor to hinder him in the lawful use of the property acquired, upon the pretext that the law allows her half of it: because this allowance refers to the cases expressed, and no others."

This passage brings out the husband's agency, his power of management and disposition, but qualifies and limits that power in protection of the wife's interest against the fraudulent use of the power. The exercise of that power, during the marriage, would not defraud her, unless she had something, a real interest, to be defrauded of. But she is not to invoke that interest against his exercise of the power, to the hindrance of the husband "in the lawful use

of the property acquired." We quote the construction put upon the language of Febrero by the Supreme Court of California, in *Fuller v. Ferguson*, 26 Cal. pp. 569-570:

"It is denied," says the Court, speaking of the argument of counsel, "that the wife could, under any circumstances, assert as against her husband, that she owned any portion of the acquisitions—the gananciales of the conjugal partnership; and the passages of the law which we have quoted at length from Febrero are relied on as establishing the doctrine which the plaintiffs maintain. This law, it may be observed, recognizes the wife's interest to the extent of one-half of the gananciales, or community property, while it inculcates the duty on her part of remaining silent respecting her portion of it during the continuance of the conjugal rela-This monition to the wife, it may be presumed, presupposes the capacity and prudence of the husband, and at the same time is designed to preserve domestic harmony."

### Gutierrez.

In 1819, a new and revised edition of Febrero's Libreria, with many notes and additions (con muchas notas y adiciones), was prepared and published by the Spanish Jurist and commentator, Don Josef Marcos Gutierrez. At page 164 of Tome III. the Commentator gives his version of the doubtful passage from the original Febrero, significantly omits the term "ficta", or "nominal", as Mr. Justice Abbott translates it, and criticises the use by Febrero of the term "revocable". The original Spanish of Gutierrez is as follows:

"A la muger casada se comunica constante el matrimonio el dominio y posesion, aunque revocable, de la mitad de los gananciales, y por fallecimiento de su marido se hace duena absoluta en posesion y propiedad de ella; pero el marido aun durante el matrimonio tiene un dominio irrevocable en todos los gananciales, y asi los puede administrar, trocar, y no siendo castrenses ni cuasi castrenses, vender y enagenar a su arbitrio, no procediendo con animo de defraudar a su muger, segun lo dice expresamente una ley recopilada."

## In English:

"To the married woman is communicated during the marriage, the dominion and possession, although revocable, of the half of the ganancials (revocable, it is quite possible, being here used, as in the law of Mexico, to point to the husband's power of conveyance—the proceeds, however, of such conveyance falling into the community estate-Novisima Sala Mexicana, Vol. 1, Title 4, Sec. 2a, Paragraph 7, ad fin.; Appendix p. 144), and, on the death of her husband, she becomes absolute master in possession and property of it; while the husband, during the marriage, holds a dominion irrevocable in all the ganancials, and so is able to administer, exchange (and not being military or quasi-military goods), sell and convey, in his judgment, provided he do not act with intent to defraud his wife, as one of the laws of the Recopilacion expressly has it."

It will be seen that Gutierrez omits the term "ficta," in respect to the wife's dominion and possession of the half of the ganancials, during the marriage. More than that, in a footnote, for which

the original Spanish is given in the appendix hereto (Appendix XI, p. 19), he says of the term "revocable":

"The distinction which is here made between the dominion of the wife and that of the husband in the gananciales, designated for the one revocable, and for the other, irrevocable,is confused and even false; since that of one consort is just as irrevocable as that of the other. By force of the law, the ganancials belong equally and undividedly (pro indiviso) to the husband and to the wife. But he has also the administration, which she lacks until, at the death of the husband, the property which belongs to her is delivered to her, and she becomes able to administer for herself. Likewise, the possession of the husband and of the wife in the gananciales is the same, although the former holds the management. One must speak in this way of the gananciales on this point, to avoid any obscurity and want of exactness.

#### Gomez and Montalbau.

The Commentators, Don Pedro Gomez de la Serua and Don Juan Manuel Montalbau, of the College of Jurisprudence of the University of Madrid, in the fourth edition of their Elements of the Civil and Penal Law of Spain, published in 1851 at Madrid (Appendix XI, pp. 32-39) speak of the conjugal society (Vol. 1, at page 256) as an institution not known to the Romans, introduced by the Visigoths at the time of the conquest of the Iberian Peninsula.

"The wives," it is said, "participating in the hardships, expeditions and combats of their husbands, it was believed that they should also participate in the prizes taken from the enemy. The Forum Judicum (Fuero Juzgo) raised the custom to a law, and extended it to every class of acquisitions; and since that period, there is known among us the legal society, which has since experienced some notable variations. Regarding it as a stimulus to excite the vigilance, industry, and carefulness of the consorts for the reciprocal interests, its utility and convenience are indisputable."

And the Commentators, in their note to page 256 of the Work, supra, illustrate "a notable variation":

"Law 17, Title 2, Book IV, of the Fuero Juzgo, divides between the spouses, in proportion to what each one has brought, the ganancials made during the marriage: subsequent legislation makes the division by halves, without regard to the goods brought." (Original Spanish in Appendix XI, p. 33).

#### Manresa.

The commentaries on the Spanish Civil Code, of Don Jose Maria Manresa y Navarro, member of the Commission-General of Codification, and Judge and President of the Supreme Court of Spain, were published in 1904, at Madrid. In Volume 9 of these Commentaries, at page 655, Manresa says:

"The ganancial properties belong to the husband and the wife during the marriage, and the proprietorship of the wife is not nominal or theoretical, but real and effective (compare Gutierrez, supra), and as proof of that, are all the limitations put upon the husband."

Manresa recognizes, in respect to the husband's power of disposition, that he may abuse it, and he remarks upon the protection which the law affords the wife against such abuse:

"But besides use, there can be abuse. In a manner hidden and guarded, not frankly and loyally, the husband can, in cases which must be regarded as exceptional, employ the power which the law confides to him, detrimentally to his wife, can alienate and encumber the properties with intent to cause loss to his wife, -as the ancient law said, fraudulently; as the code says, obtaining, by making use of deceit, a private benefit, or giving one to third persons, always to the damage of the wife. The law foresaw that situation, and declares that the acts of the husband, effected under those conditions or in the contravention of the Code, cannot prejudice the wife. As Fiore says: proves that the right of the wife in the ganancial properties, although reduced to inaction while the husband administers wisely the interests of the community, is revealed with energy when the said husband compromises the aforesaid interest'."

As the husband, during the marriage, is the manager of the community property, and as that property is liable for his debts, there must needs be, if he predecease the wife, a liquidation of the community property in order to ascertain and pay the debts. Similarly, if the wife predecease the husband, while her half of the community estate passes to her heirs, they must take in subordination to the debts. Their vested interest, by force of the descent cast upon them at the death of the wife, is in no different position from the vested interest of any heir at law, or, for the matter of that, of any testamentary devisee or legatee; for the heir or the

testamentary nominee, is subordinated to the payment of the debts. His resultant estate will be diminished *pro tanto*.

"The vesting of the property is, in no sense, delayed until the decedent's estate has been finally settled."

(Solicitor's Opinion, Internal Revenue Bulletin, Cum. Bulletin III-2, p. 177;

Murphy v. Crouse, 135 Cal. 14, 17;

Bates v. Howard, 105 Cal. 173, 182-3;

Water Company v. Anderson, 170 Cal. 683; 685-6;

Phelps v. Brady, 168 Cal. 73, 75-6;

Clokke Inv. Co. v. Lissner, 186 Cal. 731, 734; Cal. Civ. Code, Sec. 1384.)

Some confusion may arise, it has arisen, from this point of view, in the use of the term ganancials. As descriptive of the wife's status, during marriage, of her vested estate, we speak of her half of the "bienes gananciales." In practice, after liquidation and payment of debts, where she survives, her ganancial estate is subordinated, and diminished pro tanto. In this sense we may speak of the resultant ganancials, las ganancias resultantes. She may, if she will, renounce the community, as her heirs after her may do, and thus enjoy exoneration from the community debts. Hence it is that expressions are found in some of the Louisiana cases, like the expression in Landreau v. Louque, 43 La. Ann. 234, 9 So. 32: "It is elementary that the interest of the wife's heirs in the community property is only a residuary one, and their inheritance is subordinated to the payment of community debts." And again, the case refers to the interest of such heirs in the community property as that "which they had inherited from the deceased wife." The question, then, on a given occasion, would be: Does the law, sought to be applied, refer to the first meaning of the word or to the second—to the bienes gananciales, or to the ganancias resultantes?

The Commentator Manresa was alive to this distinction, and to the possible confusion. At page 667 of Volume 9 of his Commentaries, he says:

"But the word gananciales is exposed to confusion; because, during the marriage, there are the ganancial properties to which the law assigns that character in the articles 1401 to 1407, and after the dissolution of the society, there is ganancial the surplus resulting from the liquidation after the complete restoration to each partner of his or her capital (the reference here is to capital brought to the marriage in distinction from acquisitions during the marriage), and the payment of all the community debts. Does the law refer to the first meaning of the word, or to the second, to the bienes gananciales or to the ganancias resultantes?"

#### Decision of Supreme Court of Spain.

So, also, in the Decision of January 28, 1898, Supreme Court of Spain, Volume 83, page 218, of the Juris-prudencia Civil:

"Although it is certain that, until the dissolution of the marriage and the previous liquidation of the statutory society, one can neither know nor determine if there are gains or losses, such a doctrine, declared by numerous decisions of the Supreme Court, only holds efficacy when one treats of making effective the rights asserted by the participants in the gains which are supposed to be realized; but not when during the marriage, controversies come up concerning the nature of certain properties; in which event, in order to settle the controversies, it is necessary to observe the rules which establish the economic regimen of the marriage, and define the common properties and the separate properties of each consort."

In this same decision, the Supreme Court of Spain (paragraph 6th) refers to Law IV, Title 4, Book 10, of the Novisima, being the same reference made by this court in *Arnett v. Reade*, supra, quotes the same words from the law, and observes:

"Wherein it is established that the properties which husband and wife have belong to them both equally; saving those which either one may prove are his or hers separately."

## Felipe Sanchez Roman.

The Studies of Civil Law and the Civil Code, and the General History of Spanish Legislation, the work of Felipe Sanchez Roman, was published in 1912, at Madrid. Roman, who died in 1920, was one of the most eminent of the modern Spanish Jurists. He had been Professor of Civil Law in the Central University, President of the Academy of Jurisprudence of Granada, a member of the Commission-General of Codes, and of the Special Revision of the Civil Code, also a member of the Royal Academy of Moral and Political Science, Counsellor of Public Instruction, Attorney General of the Supreme Court, Counselor and Minister of

State. In Volume 1 of Tomo Quinto of this work, second edition, revised, corrected and enlarged, Roman says at pages 818-819:

"Partiendo de la distincion de los derechos de propiedad, de administración y de usufructo. que son los que integran la idea del domino propiamente tal o pleno, y respondiendo la nocion de los bienes gananciales a una propiedad colectiva para una personalidad social, que es la dociedad conyugal, asi como, no siendo posible concebir que cualquier orden social, por elemental que sea, pieda vivir sin el predominio de un elemento director que regule su accion economica y cuide de su patrimonio, resultan distribuidos los derechos en los lienes gananciales en la forma siguiente: el de propiedad a la sociedad legal, mientras esta subsiste, y despues individualmente a cada uno de los convuges, por mitad, o a sus derecho habientes; de donde los antiguos practicos deducian aquella distincion del dominio in habitu, que tiene la mujer y del dominio in actu, que tiene el marido el los lienes gananciales, por que el uno era propiedad sin administracion, v el otro propiedad con ella."

#### In English:

"Separating, by way of distinction, rights of property, of administration, and of usufruct, which are those making up, in completeness, the idea of dominio, properly such, or dominio pleno—full or absolute dominion,— and the notion of the ganancial properties arswering to a collective property through a social personality, which is the conjugal society;—inasmuch as it is not possible to conceive that any social order, however elementary, can subsist without the governance (pre-dominio) of an ultimate director, who regulates its economic ac-

tion and safeguards its patrimony, it results that the rights in the ganancial properties are distributed in the form following: That of property, to the legal society while it lasts, and afterwards, individually to each one of the spouses by half, or to those having his or her right; whence the ancient authors draw this distinction of dominio in habitu, which the wife holds, and of dominio in actu, which the husband holds, in the ganancial properties: because the one has property without administration, and the other, property with administration."

# Schmidt's Civil Law of Spain and Mexico.

Schmidt's Civil Law of Spain and Mexico was the work of an American Commentator, Gustavus Schmidt, Counselor at Law, New Orleans, La. We have had occasion to advert to the introductory history with which he prefaces his statement of the law of Spain and Mexico. Reference to this compiler is the court in Arnett v. Reade, supra. Title I of Book I, is "of Matrimony." Chapter IV of this Title reads: "Rights and Duties of Husband and Wife in Relation to the Property acquired during Marriage." Section 1 of this Chapter is entitled: "Community of Goods." It proceeds:

"Art. 43. The law recognizes a partnership between the husband and wife as to the property acquired during marriage, and which exists until expressly renounced, in the manner prescribed in Section 3." (Citing Laws 57 and 59 of Toro, and Escriche, Bienes gananciales).

Article 44 describes what property belongs to the community, including the income "of the individual property of husband and wife," and the other familiar phases of community property: (citing Law 1, Title 3, Book III of the Fuero Real, and Law 5, Title 4, Book X of the Novisima.)

Article 49 reads:

"Husband and wife are entitled to an equal share in the community, although one of them should, at the time of marriage, have been without any means. At the same time, both are liable, in equal proportion, for the losses and debts incurred during its existence." (Citing Law 3, Title 3, Book III of the Novisima.)

Article 40 of Chapter III, deals with the husband's power of administration, in respect to the individual property of his wife:

"The husband exercises, in his own name, all the civil actions of his wife, and administers all her property, enters into all contracts, accepts or renounces all inheritances and donations, appears in court both as plaintiff and defendant, alienates as he pleases his own property, and even that of his wife, in the manner explained in the second section, Chapter IV of the present Title." (Citing the third Partida, Law 5, Title II.)

#### And Article 41 reads:

"The wife cannot exercise any of the foregoing powers without the express authority of her husband, and should she do so, her acts are null." (Citing Laws 54, 55 and 56 of Toro.)

Turning, now, to Section 2 of Chapter IV, the heading is: "Of the Administration of the Community Property."

Article 51 reads: "The husband alone administers the property of the conjugal partnership, dur-

ing the existence of the marriage, and he can sell and dispose of the same as he thinks proper, provided always he does so without the intention of injuring his wife." (Citing Law 5, Title 4, Book X of the Novisima, and the 205th Law of Estilo.)

Article 52: "This power, however, must be exercised in the lifetime of the husband, and gives him no power of control over the community property, not his own, by last will and testament." (Same references to Novisima and Law of Estilo.)

Article 53: "On this account, a legacy left by the husband to his wife does not diminish the share of the latter in the matrimonial gains." (Citing 16th Law of Toro.)

Article 54: "The community is also responsible for donations made by the husband, if the same be moderate, and bestowed on relations." (Citing the Commentator Don Pablo Gorosabel, "Redaccion del Codigo Civil de Espana, Tolosa, 1832.")

Under Section 3, entitled "Of the dissolution and Renunciation of the Matrimonial Community,"—after a dissolution by death or by judicial separation has been noted, the author proceeds in Article 59:

"Confiscation dissolves the community from the moment the decree becomes executary, but such decree does in no manner affect the share belonging to the other partner." (Citing 77th Law of Toro).

Article 63 declares the presumption that all property possessed by the spouses is presumed to be-

long to the community, and is to be divided equally between them, unless proved, as to any part of it, that the same is the individual property of one of them. (Citing Law 4, Title 4, Book X, of the Novisima, and the 203rd Law of Estilo.)

Article 64: "The wife may renounce the community, and by the renunciation she forfeits all claims to the gains, and remains discharged from all the debts contracted, or losses sustained by her husband." (Citing 60th Law of Toro.)

Section 4 of Chapter IV is entitled: "Rights over the Community Property, of the Surviving Spouse."

Article 67: "On the death of the wife, the surviving husband acquires the absolute ownership and full administration of one-half of the matrimonial gains, and can freely dispose of the same, as well by contract inter vivos as by testament, without being compelled to reserve any portion thereof for the children of the marriage, provided he does not deprive them of their lawful portion" (Citing 14th Law of Toro). The term "lawful portion" is here used, as pointed out in the 14th Law of Toro, cited by Schmidt, to indicate that portion of the gananciales which belonged to the deceased wife, the mother of the children; and her portion, the surviving husband could not dispose of, but the same passed to her heirs (see Thompson v. Cragg, 24 Tex. 852, 600; Ord v. De La Guerra, 18 Cal. 68).

It will be noticed that Schmidt, in Article 67, mentions, in terms, "the surviving husband," although the heading or title of Section 4 relates to the rights over the community property, not of the surviving husband merely, but of the surviving spouse. It was evidently the author's assumption that the terms of Article 67, without repetition, mutatis mutandis, applied as well to the surviving wife. Consequently, he goes on to state in Article 68, and Article 69, how the wife may lose her portion of the matrimonial gains. In Article 68, he uses the term "wife": "The wife loses her matrimonial gains in the following cases—(1) When she has been guilty of adultery, (2) When she has abandoned her husband without his consent, (3) When she has joined some religious sect, and therein married, or committed adultery." In Article 69 he speaks in terms of the "widow": widow likewise forfeits her portion of the matrimonial gains by leading a dissolute life." His citations are to the 7th Partida, Law 15, Title 17; to the Fuero Real, Law 5, Title 5, Book 4; to the 7th Partida, Law 6, Title 25; and to the Novisima, Law 5, Title 4, Book 10.

#### The Ultimate Commentator.

The laws of Spain, it is now submitted, read in their own terms, have spoken consistently for seven hundred years,—they establish the vested interest of the wife in half the community property, they make her an equal partner and proprietor with the husband. The laws of Mexico adopted and reproduced the laws of Spain. The Commentators have interpreted these laws according to the terms in which they are expressed. The ultimate Commentator for this case and for this country is the Supreme Court of the United States. The commentary of this court was expressed in Warburton v. White, 176 U. S. 484; it was expressed in Arnett v. Reade, 220 U. S. 311.

"Property acquired during marriage with community funds became an acquest of the community, and not the sole property of the one in whose name the property was bought, although by the law existing at the time, the husband was given the management, control and power of sale of such property. This right being vested in him, not because he was the exclusive owner, but because by law he was created the agent of the community."

Warburton v. White, supra.

## And again:

"It is a misconception of that system to suppose that because power was vested in the husband to dispose of the community acquired during marriage, as if it were his own, therefore by law the community property belonged solely to the husband. The conferring on the husband the legal agency to administer and dispose of the property, involved no negation of the community, since the common ownership would attach to the result of the sale of the property."

Warburton v. White, supra.

#### And finally:

"The notion that the husband is the true owner, is said to represent the tendency of the French customs. The notion may have been helped by the subjection of the woman to marital power; and in this country, by confusion between the practical effect of the husband's power, and its legal ground, if not by mistranslation of ambiguous words like *dominio*. However this may be, it is very plain that the wife has a greater interest than the mere possibility of an expectant heir."

Arnett v. Reade, supra.

## The French Law of Community.

Since the Spanish-American law is the foundation of the community property system in California, and, as well, in other community-property states, it may be that a reference to the French system is not strictly within the scope of this argument. A brief reference to that system may, however, be tolerated—all the more, inasmuch as some French writers, noted by this court in Arnett v. Reade, supra, have seemed to think that "the notion that the husband is the true owner, represents the tendency of the French customs" (Arnett v. Reade, supra).

The French customs were not uniform. In the time of Pothier, they differed in the different provinces. By the Custom of Paris, naturally the most important, and by the Custom of Orleans, the community resulted either from a formal marriage contract, establishing it, or from the silence of such a contract, or from the marriage itself, when there was no contract. By the Custom of Brittany and of Anjou, the community would result from the silence of the parties on the subject, provided the marriage existed for a year and a day. In Southern France, in the country of the

written law—Droit Ecrit—no community arose unless it had been expressly stipulated in the prenuptial agreement. A fourth and negative phase of the Custom was found in Normandy, where the matrimonial community of property was not established by the marriage, it could not be created by contract, it was practically prohibited (Howe, Studies in the Civil Law, pp. 188, 133).

The Code Napoleon was promulgated in 1804. It made the law of the community uniform throughout France. Its provisions "are based in principle on the Custom of Paris and Orleans" (Howe, *ubi supra*, p. 189).

Canada and Louisiana were, in the first instance, French Colonies. "As the French Colonies of Canada and Louisiana derive their law from the Custom of Paris, it may be assumed that a similar regime as to the community prevailed in those colonies" (Howe, ubi supra, p. 189). "It is a curious fact," says Howe, ubi supra, p. 134, "that, in theory at least, the Custom of Paris was in force in Michigan and in Wisconsin, a part of that territory (meaning French Canada, or New France), down to the year 1810, when the Legislature of Michigan, declaring substantially that it did not know what the Custom of Paris was, and that there was no easy means of finding out, enacted a statute abolishing the whole system, and adopting the principles of law that prevailed in the other states of our country so far as applicable to the situation" (citing Lorman v. Benson, 8

Mich. 18, 25; and Coburn v. Harvey, 18 Wis. 156, 158). "In Louisiana," says Howe at page 189, "where the Spanish law prevailed during the last generation of Colonial existence, the community was governed by the rules derived from Spain." (Citing Saul v. Creditors, 6 Martin, N. S. 569; Cole's Widow v. Executors, 7 Ibid. 41.) Following these two Louisiana cases, came the case of Dixon v. Dixon's Executors, 4 La., 188, in which the distinction is sharply taken between the rights of an heir, and the rights of the wife. "The rights of heirs," it is said, "arise from the death of the ancestor; the rights of husband and wife, in the partnership of gains, grow out of the marriage contract, and do not originate in its dissolution." As the Code Napoleon, ad hoc, was "based principle on the Customs of Paris and Orleans," it is of interest to note an excerpt by the court in the Dixon case, from the "able and learned note" of the French Jurist, Paillette, on the Code Napoleon: "Du moment ou le marriage est contracté, la communauté convenue expressement, ou tacitement, acquiert une existence, et une forme irrevocable." "From the moment when the marriage is contracted," we translate, "the community, whether by express contract or by silence, takes on existence and irrevocable form." And to the question "whether the wife can acquire a right to property made during the marriage, before that marrriage is dissolved," the Louisiana court answers, in language anticipatory of Arnett v. Reade, supra:

think she may. The objection confounds the power of the husband to defeat this right, with its existence." The court is here referring to the dissipation of the community fund by the husband, or to its reduction "by his bad management." "It is, therefore," the court adds, "clear she has rights in the acquests before the husband dies."

The French Colony of Louisiana, established by LaSalle at the close of the seventeenth century, 1699, (Howe, 136), remained under French jurisdiction until the treaty of Cession to Spain, concluded November 3, 1762, but not made public until April 23, 1764. Actual possession was not taken by Spain until the arrival of the Spanish Governor, O'Reilly, with his troops, in 1769. issued a proclamation, changing the form of government of Louisiana, abolishing the authority of the French laws, and substituting those of Spain in their stead (Moreau & Carlton, Partidas, Preface, pages 18-20). At the place cited, the proclamation of the Spanish Governor is set out. "The Customs of Paris and the Ordinances of the Kingdom, observed in Louisiana while it remained under the dominion of France," (Moreau & Carlton, ubi supra, p. 18), gave way to the proclama-"From that period, as Judge Martin states in his history, it is believed that the laws of Spain became the sole guide of the tribunals in their decisions"; but the transition from French to Spanish law, in view of the "great similarity in their dispositions in regard to matrimonial rights, testaments, and succession," occasioned no great inconvenience (Howe, ubi supra, p. 137).

By treaty of Cession, concluded October 1, 1800, the Province of Louisiana was ceded back to France by Spain. France did not receive formal possession until November 30, 1803. Meantime, in April, 1803, Napoleon ceded the territory to the United States—the Louisiana Purchase, so called—and on December 20, 1803, the United States took possession (Howe, supra, p. 354). Indeed, France had been "in actual possession only twenty days" (Howe, p. 138).

It was out of this vast province that Congress, in 1804, carved the territory of Orleans—substantially the present State of Louisiana. What remained of the Purchase, was erected, ultimately, into Missouri and other states. Of the new jurisdictions, the State of Louisiana adhered to the Spanish Civil Law; the others went the way of the common law (Howe, p. 138). "The return of Louisiana under the dominion of France, and its transfer to the United States, did not for a moment weaken the Spanish laws in that Province" (Moreau & Carlton, ubi supra, p. 21).

A large measure of control had been accorded the husband, under French law, before the Code Napoleon, in respect to the management and disposition of the community property. It was considered "in theory" by some French writers, that the rights of the wife in the community were not

merely dormant during the marriage, they were not subsisting—she had a mere hope or expectancy. This was the "confusion between the practical effect of the husband's power, and its legal ground" (Arnett v. Reade, supra). In Garrozi v. Dastas, 204 U. S. 64, 78, the question was whether extravagant, or even reckless, expenditures by the husband, during the existence of the community, went beyond his power of disposition. The case was concerned with the husband's power of management. There was no purpose to derogate from the conception of the community system, expressed by the court in Warburton v. White, 176 U.S., 484, 494, that the control was given to the husband, "not because he was the exclusive owner, but because by law he was created the agent of the community,"-"no intent to deny or qualify the expression quoted from Warburton v. White" (Arnett v. Reade, 220 U. S., 311, 319).

The provisions of the Porto Rico Codes of 1889 and 1902 are said, in the Garrozi case, to be like those "obtaining in other countries where the community system prevails," reference being made to the Code Napoleon and to the Louisiana Code. By the Porto Rico Codes, it is pointed out, the husband "is the administrator of the conjugal partnership." By the earlier Code, his authority, as administrator, to sell and encumber, covered both immovable and movable property. By the later Code, his authority to sell or encumber the real estate was taken from him, "except where a

contract to that effect is made with the consent of the wife." By both Codes, "all contracts of the husband in violation of definite provisions of the Code, or in fraud of the rights of the wife, are made null and void against the wife or her heirs." It is added that "the provisions in both Codes, making the husband the administrator of the community, are here again like unto those obtaining in other countries where the community system prevails," the reference being to the Code Napoleon and the Louisiana Code. And the question before the court is said to be one as to the scope and restrictions of the husband's power "as the head and master and administrator of the community."

In the Garrozi opinion, reference is made to the case of Guice v. Lawrence, 2 La. Ann. 226. That case, as pointed out by Mr. Justice Abbott, "was decided as far back as 1847, avowedly on the Louisiana Code, in a case in which the right of the husband to convey real estate of the community to pay his separate debts, contracted before the marriage, was involved" (Reade v. DeLea, 95 Pac. 131, 141). The widow claimed, Mr. Justice Abbott proceeds to say, "that she was entitled to one-half of the community property remaining after the payment of the community debts, but the court held the alienation by the husband was valid for the purposes of that case at least. The right to proceed against the heirs of her husband, on the ground that the transfer was made in fraud of her

rights, was especially reserved to the widow by the court." The dictum of the court that the laws of Louisiana had not recognized any title in the wife, during marriage, to one-half of the acquests, as Mr. Justice Abbott declares, "went beyond the requirements of the case." And he rejects the suggestion that any provisions of the Louisiana Code, so construed, "are the embodiment of the laws of Spain."

The reference in the Garrozi case to Guice v. Lawrence, was not made with respect to the wife's vested and equal right of proprietorship in the community property during the marriage. not made to support a claim of exclusive ownership in the husband. It was directed to "the practical identity of the husband's general authority as head and master of the community, under the laws of Louisiana, the Code Napoleon, and the Spanish law." And certainly, under the Code Napoleon and the Spanish law, and, as well, under the law of Louisiana, nothing is more firmly established than that the wife holds, in common with the husband, an equal, vested interest in the community estate, and that, predeceasing her husband, this vested half is "inherited" by her children. "If, up to the moment of her death, her husband was the owner of it, how could it thereupon become a portion of her estate, subject to the law of descent"? (Mr. Justice Abbott, supra). There was "no intent to deny or qualify" the vested interest of the

wife during marriage, as expressed in Warburton v. White, supra, in the decision of Garrozi v. Dastas (Arnett v. Reade, supra, p. 319).

Indeed, the "subsisting interest" of the wife, "conferred by some of the customs of France before the Code Napoleon, and also expressly given by that Code," is recognized in terms in the Garrozi case, pp. 79-80. It is there said: "Under the law of France prior to the Napoleon Code, the extent of the power of the husband as to the community property was so great that it was considered, in theory, that the rights of the wife, in or to the community, were not merely dormant during the marriage, but had no existence whatever. other words, the doctrine was upheld that the wife, during the existence of the community, had but a mere hope or expectancy, and hence no interest whatever in the property or goods of the community until the community was dissolved (citing Dumoulin, in loco). And from this, arose the expression, that the community was a partnership 'which only commenced on its termination'. As the result, however, of the right conferred upon the wife by some of the Customs of France, before the Code Napoleon, and also expressly given by that Code, to procure a decree dissolving the community when the affairs of the husband were in such disorder as to entail risk upon the wife, it is the generally accepted doctrine, under the Napoleon Code, that the wife's interest in the community prior to the dissolution, is subsisting, though dormant."

And the Garrozi case quotes the French writer, Troplong, Contrat de Mariage, vol. 2, p. 136, as follows:

"The rights of the wife are dormant during the marriage, because the husband is charged to watch over and conduct the affairs of the conjugal society. But this right, which is inert, as long as the husband is at the head of the affairs of the community, becomes active when the marital authority ceases to exist. The wife is like a silent partner, whose rights arise and reveal themselves when the partnership ceases."

Garrozi v. Dastas, ubi supra, p. 79

The Code Napoleon, then, and the Customs of France, some of them, "before" the Code Napoleon, recognized "the subsisting interest" of the wife during marriage. The Code Napoleon, in this respect, was "based in principle on the Customs of Paris and Orleans." It is, therefore, in point to turn to a most interesting case in the House of Lords, (1900), Appeal Cases 21, Celestine de Nicols v. Curlier and others.

Two young French people were married in France in 1854. In 1863, they crossed the Channel to England. They had saved about \$2000. London became their permanent domicile. The husband opened a French Restaurant, doubtless a modest one in its first beginnings, the Cafe Royal, on Regent Street, and, in 1865, became a naturalized British subject. The young couple prospered. The restaurant business grew and flourished. In 1897,

when the husband died, he left an estate of some \$3,000,000. By the terms of his English will, this large estate was left to his executors upon certain trusts for the benefit of his wife and, after her death, of his daughter and her children. Celestine, the surviving wife, was the appellant in the House of Lords; the daughter and her children were the respondents. Was the estate, with its testamentary disposition, ruled by English law; or, per contra, did the wife, under French law, have such a vested estate in the community property, in the acquisitions made during the marriage, indefeasible by the ex parte act of the husband in changing the domicile from France to England, as would overreach and displace the English testament, and the English laws in reference to which it was made? That was the question.

There was no marriage contract formally stipulating the property rights of these spouses. They married without any contract of settlement, but they married as French citizens, under French law. Lord Chancellor Halsbury sets out in his opinion the very interesting testimony of a distinguished French lawyer, as to the law of France in the circumstances.

"The law of France," says the Lord Chancellor, "as applicable to the matter now in debate, is deposed to by M. Paul Lax, a Licentiate of Law in the University of France, an advocate who has practiced in the Court of Appeal in Paris, and his evidence upon the sub-

ject is not really questioned by the gentlemen

on the other side. M. Lax says:

" '2. According to the law of France and, in particular, arts. 1393 and 1401 of the Code Civil, parties having intermarried without entering into a formal pre-nuptial contract are governed so far as their present and afteracquired property is concerned by the legal system of community of goods as defined by arts. 1401 to 1496 in Title V. of the same Code. which title is headed 'Du Contrat de mariage et des droits respectifs des epoux.' 3. The husband and wife having so inter-married without entering into a pre-nuptial contract in writing are placed by the sole fact of the marriage and stand exactly in the same position in all respects as if previously to their marriage they had in due form executed a written contract and thereby adopted as special and expressed covenants all and every one of the provisions contained in arts. 1401 to 1496 above referred to. 4. Subject to the exceptions specified in the next following paragraph the community of goods includes (1) all personal property belonging to the husband and wife at the date of the marriage or having devolved upon either of them during coverture; (2) all interest or income of whatever nature and source accrued or received during coverture; (3) all real estate acquired during coverture (art. 1401 Code Civil). 5. Real estate possessed by either spouse at the time of the marriage or that may during coverture devolve upon him or her by way of inheritance gift inter vivos or will exclusive of real property acquired during coverture by any other means whatever does not become common property but remains the separate property of the spouse so possessing the same or upon whom the same has so devolved and any real estate

is deemed to be common property unless it is clearly proved that either husband or wife possessed the same previous to the marriage or became entitled to it during coverture by way of inheritance, gift inter vivos, or will as aforesaid (arts. 1402 and 1404 Code Civil). 6. The administration of the common property belongs to the husband alone who may sell deal with and mortgage the same without the wife's concurrence (art. 1421 Code Civil). The common property real as well as personal stands or is invested in the name of the husband 7. In the case of a legal community of alone. goods any trade or business carried on either by the husband alone or by the husband and wife jointly is necessarily carried on for the account and benefit or at the risk of the community of goods. The whole assets of the said community, also the husband's separate real estate if any and the husband himself personally in infinitum are liable for the debts of such trade or business the wife not being liable for the same except to the extent of her share in the common property. The name of the husband alone appears in the firm or style of any trade or business carried on as aforesaid. 8. In case any real estate which remains the separate property of either spouse has been disposed of and the purchase consideration has not been reinvested in the name of the one to whom such real estate belonged but has been merged in the common property the spouse whose separate property the real estate so disposed of was is on the winding-up of the community of goods preferentially entitled to receive out of the common property the amount of the purchase consideration referred to (art. 1470 Code Civil). 9. The community of goods when once constituted between husband and wife and whether created by an instrument in

writing or by the operation of arts. 1393 and 1400 of the Code Civil cannot cease or be determined by mutual consent or by any cause or event whatever except the following that is to say: (1) Decease; (2) Divorce; (3) Judicial Separation; (4) Separation of estates decreed by a competent court of justice."

Such being the French law, as expressed by the Code Napoleon, Lord Chancellor Halsbury goes on to say:

"If this is the law by which the matter is to be governed, it cannot be denied that the appellant here must succeed, and it is a little difficult to understand upon what principle contracts and obligations, already existing inter se, should be affected by an act of one of the contracting parties over which the other party to the contract has no control whatever. And indeed, it is not denied that if, instead of the law creating these obligations upon the mere performance of the marriage, the parties had themselves, by written instrument, recited in terms the very contract the law makes for them, in that case the change of domicile could not have affected such written contract. wholly unable to understand why the mere putting into writing the very same contract which the law created between them without any writing at all, should bar the husband from altering the contract relations between himself and his wife, when, if the law creates that contract, then the husband is not barred from getting rid of the obligation which, upon his marriage, the law affixed to the transaction."

Lord Halsbury points to "the cardinal distinction between the French and the Scottish law," as not without an important bearing upon the question in debate, and I think it may be stated shortly thus:

"If the wife, by the marriage in Scotland, acquired no proprietary rights whatever, but only what is called a hope of a certain distribution upon the husband's death, it is intelligible that that right of distribution, or by whatever name it is called, should be dependent upon the husband's domicile, as following the ordinary rule that the law of a person's domicile regulates the succession of his movable property. But if, by the marriage, the wife acquires, as part of that contract relation, a real proprietary right, it would be quite unintelligible that the husband's act should dispose of what was not his."

"Doubtless it is true," he goes on, "that, according to the authorities on Scottish law, the right of the wife is no right at all in its strict sense. When speaking of the jus mariti, it is described as a legal assignation to the husband. and, in commenting on this authority, the late Mr. Fraser, while at the Scottish Bar, in his book on the Law of Husband and Wife, 2nd ed., Vol. 1, p. 677, says: 'At a very early period of our law, the distinction between the two rights was recognized. The right of administration was regarded as being nothing more than its name imports—a right of administering the property of the spouses; while the jus mariti was something separate and superior, its purpose being to transfer the property from one spouse to the other."

He notes "how different the position of the wife is under the French law," and proceeds to say:

"If the propositions are put shortly—that the wife acquires no proprietary right by marriage under the Scotch law at all, but under the French law acquires a real proprietary right, the distinction between the two systems is evident enough. The communio bonorum in Scotland is a mere fiction. In France, it is a reality."

The appositeness of these references to the Scottish law, is seen in the circumstance that the Lord Chancellor distinguishes as inapplicable a case decided by Lord Eldon, where the deceased husband had been a domiciled Scotchman.

In fine, "as I have endeavored to point out," says the Lord Chancellor,

"The French marriage confers not only an implied but an actual binding partnership proprietary relation, fixed by the law upon the persons of the spouses, the binding nature of which, it appears to me, no act of either of the parties contracting marriage can affect or qualify."

There was no dissent from the views of the Lord Chancellor. All the Law Lords concurred. "Community of goods in France is constituted by a marriage in France according to French law," said Lord MacNaughten. Or, as Lord Shand expressed it,

"When her marriage took place in France, in the absence of any written contract, the provisions of the Code Civil of 1804, and particularly the provisions immediately succeeding section 1400, established the system of community between the spouses, under which the right to one-half of the joint estate of the spouses, as defined in these sections, became

vested in the appellant, and was not lost by the change of domicile."

Lord Brampton, in his concurring opinion, speaks of the wife, acting upon the faith of the French community system, as having

"Placed in the possession of her husband as part of the capital of their 'conjugal partnership,' such little property as she could then call her own; and from that time until the death of her husband, it was never suggested that, with the change of domicile to England, the rights of property the wife had acquired by her marriage in France, vested in her husband as absolute owner, as if they had been married in England without any settlement at all."

It is believed, and is now respectfully submitted, with what we venture to think is a just confidence, that the vested interest during coverture of the wife in the community estate is fundamental, as well to the French community system, as to the Spanish-Mexican law of community, from which the law of California, like the law of other community property States, has been derived.

#### II.

THE CONSTITUTION AND STATUTES OF CALIFORNIA RE-FLECT THE SPANISH-AMERICAN LAW IN FULL RECOG-NITION OF THE WIFE'S VESTED ESTATE IN HALF THE ACQUISITIONS MADE DURING THE MARRIAGE.

The year, 1846, was the year of conquest in California. "The American Army took possession of

California in 1846" (Botiller v. Dominguez, 130 U. S. 238, 244). It was said by the Supreme Court of California in the historical case of Hart v. Burnett, 15 Cal. 530, 559, speaking of the American occupation:

"It is a well established principle of international law, that the military occupation of a conquered territory does not, in general, effect any change in the laws of that territory. The political connection between its inhabitants and their former sovereign or State, is interrupted or suspended so long as the occupation continues, and is entirely severed on the completion or confirmation of the conquest, whether by treaty of cession or otherwise. The right of the conquerer to govern the enemy's territory which he may occupy, is not derived from the Constitution or political institutions of his own State, but flows directly from the laws of war, as established by the usage of the world, and confirmed by the writings of publicists and the decisions of courts; in fine, from the law of nations. It is held by the same code, that, although the conquerer may suspend the laws and entirely displace the former local and civil authorities, or limit or change their powers, this is not usually done; and consequently, that such changes are not to be presumed, but must be proved. Even where the conquest is completed by cession or treaty of peace, although the laws political which bound the country and its inhabitants to the former sovereign, are thereby completely abrogated, the municipal laws of the country continue in force until changed by the proper authorities; and the existing government and its officers continue to exercise the powers and authority conferred by such laws, so far as they are not inconsistent with the will,

expressed or necessarily implied, of the new sovereign. Neither military occupation nor complete conquest produces, as a general rule, any change in private property, no matter whether belonging to individuals or municipalities, or by what kind of title it may be held. These views are sustained by the best authorities." (The references are to decisions of this court, and to the various publicists.)

The spirit of this passage had been embodied in the Treaty of Guadalupe Hidalgo, of February 2, 1848, 9 Stat. 922, which closed the Mexican War, and ceded California to the United States. The private property of the inhabitants who had lived under the Mexican regime, was protected by this Treaty; "and it may be conceded that the obligation of the United States to give such protection, both by this Treaty and by the Law of Nations, was perfect" (Botiller v. Dominguez, 130 U.S. 238, 243-4). This recognition of property rights, growing out of the laws and institutions of Mexico, was carried into the Act of Congress of March 3, 1851 (9 Stat. 631), entitled "An Act to Ascertain and Settle the Private Land Claims in the State of California". A Board of Commissioners was erected to adjudicate land claims in California, set up "by virtue of any right or title derived from the Spanish or Mexican government" (Sec. 8). And it was provided in Section 11, that the Commissioners, in adjudicating such claims, "shall be governed by the Treaty of Guadalupe Hidalgo, the Law of Nations, the Laws, Usages, and Customs of the Government from which the claim is derived, the principles of equity, and the decisions of the Supreme Court of the United States, so far as they are applicable" (Botiller v. Dominguez, supra, pp. 234-6).

In pursuance of Governor Riley's Proclamation of June 3, 1849, the Convention for forming a State Constitution for California, met at Monterey on September 1, 1849. The Constitution of California was drawn by this Convention, adopted by it, October 10, 1849, ratified by the People November 13, 1849, and proclaimed December 20, 1849. The Act of Congress, admitting California, like a full-grown Minerva, without territorial infancy, was approved September 9, 1850.

By the Statute of April 13, 1850 (Stats. 1850, p. 219), the first Legislature of California provided, and the provision was re-enacted in the California Codes (Political Code, Section 4468), that "the common law of England, so far as it is not repugnant to, or inconsistent with, the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in all the courts of this State."

The Common Law was thus adopted—not without a struggle, for the Civil Law had its advocates. A provision, however, was written into the Constitution of 1849, by which the common law of the wife's status in respect to matrimonial property, was ex-

cluded, and her rights in such property, as they existed under the Spanish-Mexican authority, before the days of the conquest, were recognized, retained, and protected.

"The Spanish-Mexican Civil Law was, of course, the law in force in California at the time of its cession by Mexico to the United States; and it was the design of the Constitution of 1849 to preserve, so far as might be, to the wives of the inhabitants of the new state, most of whom were at that time former citizens of Spain or Mexico, the rights to the community property which they had enjoyed under the Mexican rule."

Estate of Moffitt, 153 Cal. 359, 363.

By Article XI, Section 14, of the Constitution of 1849, it was provided:

"All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterward, by gift, devise or descent, shall be her separate property, and laws shall be passed more clearly defining the rights of the wife in relation as well to her separate property as to that held in common with her husband. Laws shall also be passed providing for the registration of the wife's separate property."

The three species of property, as classified in "the Spanish-Mexican Civil Law", are here distinctly recognized—the separate property of the husband, the separate property of the wife, and "that held in common with her husband". Pursuant to the mandate of the Constitution, the Legislature of 1850

passed the Act of April 17, 1850, entitled: "An Act defining the rights of Husband and Wife" (Stats. 1850, p. 254).

Section 1 of the Act reads:

"All property, both real and personal, of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, shall be her separate property, and all property, both real and personal, owned by the husband before marriage, and that acquired by him afterwards, by gift, bequest, devise or descent, shall be his separate property."

Section 2, in distinction from the separate property of the wife, and the separate property of the husband, designates the property which shall be common to both.

"All property acquired after marriage by either husband or wife, except such as may be acquired by gift, bequest, devise or descent, shall be common property."

Sections 3, 4 and 5 provide for the inventory and registration of the wife's separate property; and, in view of the husband's management and control, as well of her separate property as of the community property, to be presently noted, Section 4 exempts her separate property "from seizure or execution for the debts of her husband", from the time of the recordation of the inventory of her separate property, duly acknowledged, "in the office of the Recorder of the County in which the parties reside."

Section 6 gives the husband "the management and control of the separate property of the wife during the continuance of the marriage;" with the qualification that "no sale or other alienation of any part of such property can be made, nor any lien or encumbrance created thereon," except by written instrument, signed by husband and wife, and acknowledged by her upon an examination apart from her husband, before an accredited officer. In the event of such sale, the wife, pursuant to Section 7, may pass the proceeds to her husband, by way of gift, manifesting her consent in writing. Her right to judicial relief, in the event that her husband is wasting her separate property, and to the appointment, in his stead, "of a trustee to take charge of and manage her separate estate," is declared by Section 8.

Section 9: As in respect to the separate property of the wife, under Section 6, so under Section 9, in respect to the common property, the management and control are in the husband, but with a broader "power of disposition" in the case of the common property. "The husband", Section 9 reads, "shall have the entire management and control of the common property, with the like absolute power of disposition, as of his own separate estate. The rents and profits of the separate property of either husband or wife shall be deemed common property".

Section 10 abolishes tenancy by the courtesy, and dower,

Section 11: It is here provided, as it had been provided by the laws of Spain and Mexico, that upon the death of the wife, should she die before the husband, her half of the common property shall go to her descendants, and, failing such descendants, to the husband. This provision applies reciprocally, where the husband dies before the wife. The section reads:

"Upon the dissolution of the community by the death of *either* husband or wife, one-half of the common property shall go to the survivor, and the other half to the descendants of the deceased husband or wife, subject to the payment of the debts of the deceased. If there be no descendants of the deceased husband or wife, the whole shall go to the survivor, subject to such payment."

## Section 12:

"In case of the dissolution of the marriage by the decree of any court of competent jurisdiction, the common property shall be equally divided between the parties, and the court granting the decree shall make such order for the division of the common property, or the sale and equal distribution of the proceeds thereof, as the nature of the case may require."

## By Section 13,

"the separate property of the husband shall not be liable for the debts of the wife contracted before the marriage, but the separate property of the wife shall be and continue liable for all such debts." By Section 14, the rights of husband and wife, married in California, shall be governed by this Act, in the absence of a marriage contract containing stipulations contrary thereto; and by Section 15, the rights of husband and wife, married in this State prior to the passage of this Act, or married out of this State, who shall reside and acquire property herein, shall be governed by this Act with respect to such property as shall be hereafter acquired, unless there be a marriage contract to the contrary.

The Act of 1850, therefore, recognizes the wife as a common owner with the husband of the property acquired, in the ganancial sense, during marriage, and designates such property as "the common property". The management and control, the power of disposition, "of the common property", as, too, of the separate property of the wife, is placed in the husband. No confusion existed in the mind of this first Legislature, standing at the fons et origo-the Spanish-Mexican law-between the ownership of the wife, upon the one hand, and the control and power of disposition of the husband, on the other. The management and control of the common property was, by Section 9, committed to the husband; so was the management and control, as well, of the separate property of the wife. In respect to her separate property, the qualification was annexed that she should join with him in the instrument of alienation or incumbrance; but the courts, from the beginning, held that he could not dispose of the community property in fraud of her rights, and,

again, notwithstanding the absence in express terms of any limitation in this statute upon his testamentary power of disposition, held that such power of disposition did not include her half of the community property; and again, by the Act of 1891 (Stats. 1891, p. 425, Civil Code, Sec. 172), the Legislature deprived the husband of any power to make a gift of any community property, without the written consent of the wife; and in 1917 (Stats. 1917, p. 829; Civil Code, Section 172a), the Legislature made the wife a necessary party to every conveyance or incumbrance of the community real estate, or to any lease of it for a longer period than one year, notwithstanding that the transaction was for a valuable consideration.

In 1861, the Legislature, exercising its undoubted power over the devolution of property post mortem, amended the Act of 1850, Section 11, which had made the surviving husband a beneficiary of the predeceased wife's half of the community property only in the event that she died without descendants, by providing that, upon her death, all of the community property should go to the surviving husband (Stats. 1861, pp. 310-311). But whereas the Act of 1850 had not, in so many words, excluded the husband's testamentary power of disposition in respect to the community property, though the implication of such exclusion of testamentary power touching the wife's half, is the effect of the statute by an implication not to be resisted, and it was so adjudged

by the courts,—now, in exact terms, by the amendment of 1861, the testamentary power of the husband was limited to his half of the community estate.

By the Act of April 4, 1864 (Stats. 1863-64, p. 363), Section 11 of the Act of 1850 was again amended by dispensing the common property from administration, from liquidation by probate procedure, in the event that the wife died first. Since the Amendment of 1861 had devolved upon the surviving husband the sole proprietorship of the community estate, as to which, during the wife's life, he had exercised sole management, it seemed to the Legislature that, the wife predeceasing, there was no apparent necessity for a formal liquidation.

These amendments of 1861 and 1864 are reproduced in the community property system, carried on by the Civil Code of California. In the case of Dow v. Gould and Curry Silver Mining Company, 31 Cal. 630, 643-4, decided in 1867, seven years after the unhappy "expectancy" dictum of Van Maren v. Johnson, 15 Cal. 308, the Supreme Court of California upheld the constitutionality of Section 6 of the Act of 1850, committing the management and control of the wife's separate property to the husband, and requiring his assent to her conveyance of the same. She was not, thereby, in the view of the court, deprived of any right of property.

"The purpose of the provision", said the court, "requiring the assent of the husband to the conveyance of the wife, it is admitted on all

hands, is not to confer upon him any right of property, any ownership, but it is to guard and protect the interests of the wife."

# And again (p. 638):

"The word 'separate', as used in that section, neither enlarges nor limits the right of the married woman in or to the property mentioned in that branch of the section, but it serves merely to distinguish such property from other property in which she is interested, which is also mentioned in the section—the common property of both husband and wife".

## And, further, the court says:

"An argument may legitimately be drawn from the manner in which the subject-matters committed to the legislative control are coupled in the section of the Constitution. Laws are to be passed more clearly defining the rights of the wife 'in relation as well to her separate property as to that held in common with her husband'. It is not expressly declared what right or title she shall possess in the common property, nor is the common property defined; but, at the time of the formation of the Constitution, it was a term of well known signification in the laws then in force, and a right on the wife's part in property of that character, was recognized by the Constitution. No distinction between the nature of the rights to be defined, as they may relate to either of the two classes of property, is indicated. The language does not tend to show that, while as to the common property the legislature may prescribe her rights, as to her separate property authority was given to prescribe only matters of form. But without going to the length of saying that, by the recognition

of the right of the wife in the common property, her title became fixed beyond the reach of legislative alteration, it is sufficient to say that it is incredible that the framers of the Constitution, in committing to the legislature the same authority in the same terms over two subjects having an intimate relation, should have intended that the Legislature should exercise plenary control over the one, and only the most limited and almost immaterial power over the other."

The court, observing upon the Constitution, "that its leading principles and most of its details have a common law origin", finds "a marked exception in the Section under consideration, providing for the separate property of the wife, and the common property of both husband and wife" (pp. 640-641). And the court has no difficulty in distinguishing between the ownership of the wife, and the management and power of disposition committed to the husband.

"An infant possesses the ownership of his estate, and yet it is not doubted that it is competent to the Legislature, considering the disability of infancy at common law, to provide that his guardian shall be entitled to its management, and possess the power of sale, under the direction of the probate court. And this is true, notwithstanding the Constitutional declaration of the inalienable right, pertaining alike to all persons, of 'acquiring, possessing, and protecting property'."

#### Civil Code of California.

The law of California was codified and re-stated in the Codes, adopted March 21, 1872. Part I of the Civil Code, Division Second, deals with Property in General. Title II of Part I, relates to Ownership; and Chapter II of this Title is headed, Modifications of Ownership. Section 678 of this Chapter reads:

"Sec. 678. Ownership, absolute or qualified. The ownership of property is either:

1. Absolute; or

2. Qualified."

"Sec. 679. When absolute. The ownership of property is absolute when a single person has the absolute dominion over it, and may use it or dispose of it according to his pleasure, subject only to general laws."

This section, on its face, takes the distinction between "ownership" and "dominion". And the time has never been, in the law of California, when the husband had the "absolute" dominion over the common property, nor could he ever dispose of it, "according to his pleasure".

"Sec. 680. When qualified. The ownership of property is qualified:

When it is shared with one or more persons;

2. When the time of enjoyment is deferred or limited;

3. When the use is restricted."

Was the common property "shared" between husband and wife—how else could it be "the common property of both husband and wife"? Was its use restricted, in the exercise of the husband's management and power of disposition? Could he dispose of it in fraud of her rights, not to speak of other restrictions? Could he dispose of her half by will?

"Sec. 681. Several ownership, what. The ownership of property by a single person is designated as a sole or several ownership."

"Sec. 682. Ownership of several persons. The ownership of property by several persons is either:

- 1. Of joint interests;
- 2. Of partnership interests;
- 3. Of interests in common;
- 4. Of community interest of husband and wife."

"Sec. 684. Partnership interest, what. A partnership interest is one owned by several persons, in partnership, for partnership purposes."

"Sec. 686. What interests are in common. Every interest created in favor of several persons in their own right is an interest in common, unless acquired by them in partnership, for partnership purposes, or unless declared in its creation to be a joint interest, as provided in section six hundred and eighty-three, or unless acquired as community property."

"Sec. 687. Community property. Community property is property acquired by husband and wife, or either, during marriage, when not acquired as the separate property of either."

These sections of Chapter II fall under Article I of that Chapter, entitled: "Interests in Property". The "community interest of husband and wife" is an "interest in property", the "ownership" of which is "by several persons", to-wit: by the husband and the wife. But there is a section of this same Article, following on in sequence, which tells what is not "an interest in property"; and this is where the "expectancy" belongs and is bestowed. It is Section 700.

"Sec. 700. Qualities of expectant estates. A mere possibility, such as the expectancy of an heir apparent, is not to be deemed an interest of any kind."

And turning to the Title and Chapter dealing with Transfer, and to Article II entitled: "What may be transferred", we have:

"Sec. 1044. What may be transferred. Property of any kind may be transferred, except as otherwise provided by this article."

"Sec. 1045. Possibility. A mere possibility, not coupled with an interest, cannot be transferred."

Division I, Part III, of the Civil Code, deals with Personal Relations. Title I deals with Marriage; Chapter III of this Title, with Husband and Wife. Section 158 provides that husband and wife may enter into any engagement or transaction, the one with the other, or with any other person, respecting property, "which either might, if unmarried"—subject to the general rules applicable to confidential relations. Under Section 159 husband and wife

"cannot, by any contract with each other, alter their legal relations, except as to property", and except as to an immediate separation. Section 161 reads as follows:

"Sec. 161. May be joint tenants, etc. A husband and wife may hold property as joint tenants, tenants in common, or as community property."

Section 162 defines the separate property of the wife in the words of the Act of 1850, adding, however, by way of expansion of her status, that "the wife may, without the consent of her husband, convev her separate property." Section 163 follows the Act of 1850, in defining the separate property of the It is to be understood, in respect to the husband. Code provisions, that they make the "rents, issues and profits" of separate property, not community property, but, like the source from which they come. separate property. "All other property acquired after marriage by either husband or wife, or both, is community property (Sec. 164). And by this Section, a conveyance to the wife and her husband. or to the wife and any other person, is presumptively, so far as her interest is concerned, to her as a tenant in common; and again, where the conveyance is to the married woman alone, the title is presumptively vested in her as separate property.

Since the husband has the management and power of disposition of the community property—this, with qualifications—, it is provided in Section 167 that

the community property is not liable for the postnuptial contracts of the wife, unless secured by a pledge or mortgage thereof, executed by the husband. By Section 168, "the earnings of the wife are not liable for the debts of the husband"; and by Section 169, "the earnings and accumulations of the wife, and of her minor children, living with her or in her custody—while she is living separate from her husband,—are the separate property of the wife".

Section 172 of the Civil Code relates to the "Management of Community Property". When the Civil Code was adopted, March 21, 1872, this Section read:

"The husband has the management and control of the community property, with the like absolute power of disposition, other than testamentary, as he has of his separate estate."

The courts consistently held, under this language, taken from the Act of 1850, but expressly imposing the restriction on the husband's power of disposition by testament, that he could not make a disposition of the community property in fraud of his wife's rights therein. And, as we had occasion to notice in reviewing the Spanish-Mexican law, his power to dispose of the community property by gift, was restricted to "a voluntary dispostion of a portion of the property, reasonable in reference to the whole amount," as was held in Lord v. Hough, 43 Cal. 581, 585, in which case a gift by the husband, out of community property worth over \$100,000, made to his mother in the sum of \$4,000, was sustained, as "not

unreasonable in amount". In 1891 (Stats. 1891, p. 425), the Legislature amended the original Section by adding the following proviso:

"Provided, however, that he cannot make a gift of such community property, or convey the same without a valuable consideration unless the wife in writing consent thereto."

Again, in 1901 (Stats. 1901, p. 198), the Legislature amended the section by adding a further proviso:

"And provided, also, that no sale, conveyance or encumbrance of the furniture, furnishings, and fittings of the home, or of the clothing and wearing apparel of the wife or minor children, which is community property, shall be made without the written consent of the wife."

It was in 1917 that the Legislature so limited the agency of the husband, that, in respect to the community real property, it was required that "the wife must join with him" in the transfer of such realty, or in the lease thereof for more than a year. This provision of 1917 led to the recasting of Section 172, which had theretofore dealt with the community property generically, and to the separation of that section into two sections, 172 and 172a, the one pertaining to the personal property, the other to the realty. Some distinction between personalty and realty, in the matter of management and disposition, is inherent in the differing characteristics of the two species of property.

"In all the community property states", as Judge Rudkin justly remarked in Blum v.

Wardell, supra, "from the necessity of the case, the agency of the husband, as head of the family, is much broader, and his control and dominion over personal property much greater, than in the case of real property; but it has never been supposed that this difference lessens the estate of the wife in community property."

We now give the two sections as re-cast by the Legislature in 1917 (Stats. 1917, p. 829):

"Sec. 172. Management of community personal property. The husband has the management and control of the community personal property, with like absolute power of disposition, other than testamentary, as he has of his separate estate; provided, however, that he cannot make a gift of such community personal property, or dispose of the same without a valuable consideration, or sell, convey, or encumber the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the wife or minor children that is community, without the written consent of the wife."

"Sec. 172a. Management of community real The husband has the management and control of the community real property, but the wife must join with him in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered; provided, however, that the sole lease, contract, mortgage or deed of the husband, holding the record title to community real property, to a lessee, purchaser or encumbrancer, in good faith without knowledge of the marriage relation shall be presumed to be valid; but no action to avoid such instrument shall be commenced after the expiration of one year from the filing for record of such instrument

in the recorder's office in the county in which the land is situate."

The analogy, here, to an estate by the entirety, as modified by modern legislation, will suggest itself: Niles v. Fisher, 144 N. Y. 306; Toole v. Oneida Co., 37 N. Y. S. 9; aff. on opinion below, 43 id., 1160.

The proprietary equality of husband and wife is once again recognized by the amendment of 1921 (Stats. 1921, p. 91, Civil Code, Sec. 172b), supplementing Section 172a, and providing that where "either the husband or wife has been adjudged insane or incompetent", the competent spouse, whether husband or wife, may be empowered, by judicial order, "to sell and convey, mortgage or lease" the property.

The Act of 1850, in Section 12, had provided that, "in case of the dissolution of the marriage, by the decree of any court of competent jurisdiction, the common property shall be equally divided between the parties, and the court granting the decree shall make such order for the division of the common property, or the sale and equal distribution of the proceeds thereof, as the nature of the case may require."

This section was carried, in terms, into Section 146 of the Civil Code, as adopted March 21, 1872. By the amendment of 1874 (Stats. 1873-74, p. 191), where the divorce went on adultery or extreme cruelty, the community property became assignable "to the respective parties in such proportions as

the court, from all the facts of the case, and the condition of the parties, may deem just."

The wife, moreover, could enforce her right in the community property, without awaiting a decree of divorce, and, indeed, to the exclusion of a divorce proceeding at all. It was competent to her, where the husband had defaulted in his fiduciary capacity as agent and manager of the common property, to secure from the court, in a proceeding for that single purpose, an allotment from the community estate of "whatever is necessary for her maintenance and suitable to her station in life". That was ruled in Galland v. Galland, 38 Cal. 265, as early as 1869, distinguishing between "the common property of the husband and wife", upon the one hand, and "his control, as the head of the family", on the other, and expressing, as the theory on which the wife's right was founded, "that the common property was acquired by the joint efforts of husband and wife". The Civil Code of 1872, Section 137, as amended (Stats, 1877-78, p. 76), after providing for alimony to the wife in actions of divorce, deals with the situation of a delinquent husband against whom the wife does not proceed in divorce:

"When the husband wilfully deserts the wife, she may, without applying for a divorce, maintain in the district court an action against him for permanent support and maintenance of herself, or of herself and children."

By amendment of 1905 (Stats. 1905, p. 205), the limited specification of the husband's delinquency

was enlarged to include all cases "when the wife has any cause of action for divorce as provided in Section 92 of this Code," -being the section enumerating the six "causes for divorce". One of those causes is the "wilful neglect" of the husband-his failure to provide for the wife. (Civil Code, Sections 92, 105.) Such failure to provide, however, to be a cause for divorce, "must continue for one year". (Civil Code, Section 107.) By the amendment to Section 137 of the Civil Code (Stats. 1907, p. 82), where the wife seeks an allotment of the common property without proceeding for a divorce, she is relieved, in such case, from the necessity, obtaining in actions for divorce on the ground of failure to provide, of waiting for the expiration of a year; no period of waiting is imposed or specified. The allowance to the wife is not a matter of periodical payments only. An amount in gross may be awarded her, as was held in Robinson v. Robinson, 79 Cal. 511, decided in 1889. By the amendment of 1917 to Section 137 (Stats. 1917, p. 35), the express declaration was superadded, that

"the court, in granting the wife permanent support and maintenance of herself, or of herself and children, in any such action, shall make the same disposition of the community property, and of the homestead, if any, as would have been made if the marriage had been dissolved by the decree of a court of competent jurisdiction."

It has been seen that by the Act of 1850, as first written, upon the death of either husband or wife, "one-half of the common property shall go to the survivor, and the other half to the descendants of the deceased husband or wife". The heirs, whether of the deceased wife or of the deceased husband, took, respectively, by a descent cast. By the amendment of 1861, upon the death of the wife, the entire common property, in the exercise of the legislative power over the devolution of property after death of the owner, was made to go to the surviving husband; and by the amendment of 1864, the necessity of a liquidation or administration, where the husband survived, was dispensed with.

The Civil Code of 1872, Section 1401, in the case of the death of the wife, repeats the earlier legislation by which the entire community property, without administration, belongs, "upon the death of the wife", to the surviving husband; adding the qualification, "if he shall not have abandoned and lived separate and apart from her"—in which event, "the half of the community property, subject to the payment of the debts chargeable to it, is at her testamentary disposition, and in the absence of such disposition, goes to her descendants or heirs at law, exclusive of her husband". By the amendment of 1874, the legislature, assuming that the abandoned wife would avail herself of judicial relief, altered the phraseology of Section 1401, to read:

"Upon the death of the wife, the entire community property, without administration, belongs to the surviving husband, except such portion thereof as may have been set apart to her by judicial decree, for her support and maintenance, which portion is subject to her testamentary disposition, and, in the absence of such disposition, goes to her descendants or heirs, exclusive of her husband."

In 1923 (Stats. 1923, p. 30) the Legislature amended Section 1401 by conferring upon the wife the power of disposition by will of her half of the community property. This power of disposition by will, accorded to her by the Legislature, did not create or originate her ownership; it recognized her ownership, that the half was her property, and it extended to her the legislative privilege of directing the disposition of her property after death. right of the citizen "to dispose of his property by will has always been considered purely a creature of statute, and within legislative control" (U. S. v. Perkins, 163 U. S. 625, 627). The Legislature of California, by the amendment of 1923, gave to the wife the right and privilege of disposing by will of "her property". Section 1401, as thus finally amended, reads:

"Community property on death of spouse. Upon the death of either husband or wife, one-half of the community property belongs to the surviving spouse; the other half is subject to the testamentary disposition of the decedent, and, in the absence thereof, goes to the surviving spouse, subject to the provisions of Section 1402 of this Code."

The status, then, of husband and wife, in the view that the whole of the community property, *upon* the death of *either*, belongs to the survivor, is precisely identical, and the privilege is accorded to either to make disposition by will of his or her half.

Section 1402 of the Civil Code, as enacted in 1872, repeats the Act of 1850, as amended in 1864. In 1923 (Stats. 1923, p. 30), it was re-cast, to conform its phraseology to the terms of Section 1401, amended at the same time. It thus came to read—the significant use of the word "control" will be observed—as follows:

"Sec. 1402. Community property subject to administration. Husband's control after death Community property passing from the control of the husband, either by reason of his death or by virtue of testamentary disposition by the wife, is subject to administration, his debts, family allowance and the charges and expenses of administration; but in the event of such testamentary disposition by the wife, the husband, pending administration, shall retain the same power to sell, manage and deal with the community personal property as he had in her lifetime; and his possession and control of the community property shall not be transferred to the personal representative of the wife except to the extent necessary to carry her will into effect. After forty days from the death of the wife, the surviving husband shall have full power to sell, lease, mortgage or otherwise deal with and dispose of the community real property, unless a notice is recorded in the county in which the property is situated to the effect that an interest in the property, specifying it, is claimed by another under the wife's will."

Well could Judge Rudkin say, in Blum v. Wardell, supra, speaking of the community property legislation of 1917, "if that Act does not recognize in the wife a valid, subsisting, vested interest and estate in the community property during the life of the husband, language is without meaning, and legislation without avail." It was the long and consistent recognition and protection of the wife's vested estate, by the legislature of California, which led the Legislature, of 1917, in amending the Inheritance Tax Law of the State, to "a legislative disapproval of the decision in the Moffitt case" (Blum v. Wardell, supra), and to the statutory direction that, for the purpose of state inheritance taxes, "her said one-half of the community" should not be taxed, and, so far from being "deemed to pass to her as heir to her husband." should be deemed to pass to her "for valuable and adequate consideration, and her said one-half of the community shall not be subject to the provisions of this Act" (Stats. 1917, p. 880). The consideration was indeed valuable and adequate.

"The statute proceeds upon the theory that the marriage, in respect to property acquired during its existence, is a community of which each spouse is a member. equally contributing by his or her industry to its prosperity."

Meyer v. Kinzer, 12 Cal. 248, 252, per Field, J.

### Legislation of the Other Community Property States.

We have referred, from time to time, as the occasion seemed to make it relevant, to the statutes and decisions of the other seven community-property states. A more complete review will not be necessary here. That work has been done carefully, and at large, in the able brief, filed in this ease by Mr. Allen G. Wright, amicus curiae, as counsel for the San Francisco Chamber of Commerce. In the result, it may be said, as Mr. Wright says,—as was said before him, in Blum v. Wardell, supra,—that there is "a practical identity between what constitutes community income and property in all the community property states." If any qualification of this statement is to be made, it will be to the effect, that, in California, even more than in the other community-property states, the wife's vested estate is protected, and the husband's control is restricted.

### III.

### CONFICTING DECISIONS IN CALIFORNIA.

The legislation of California, in respect to the wife's vested interest, has been clear enough. There is no confusion, no conflict. Its policy has been consistent from the beginning, to establish that interest on a parity with the like interest of the husband, and to hedge it round with one safeguard

after another. The decisions of the courts have not been without conflict. The vested interest of the wife, in far the greater number of decisions. from Beard v. Knox, 5 Cal. 252, decided in 1855, to the last expression of the Supreme Court of the State, in Estate of Jolly, 238 Pac. 353, decided in August, 1925, has been sustained upon the firm ground that she was a co-partner and equal owner with her husband in the community estate, and that, upon his death, she took her half of the dissolved community, not as the heir of a husband who was exclusive owner, but in her own right, as survivor of the matrimonial partnership. There are conflicting cases, in point of number, a minority; and in point of authority, largely dicta—it may be said, with perhaps a single exception, dicta in each in-These are the dicta which apply to the stance. wife's interest, the attenuating similitude of an "expectancy"—the expectancy of an heir apparent in the property of his ancestor. The remark fell primarily from Mr. Justice Field, obiter, in passing, not the point in judgment, in Van Maren v. Johnson, 15 Cal. 308, 312, written in 1860. In his decisions, before and after, Mr. Justice Field upheld the vested and equal interest of the wife.

In Beard v. Knox, 5 Cal. 252, the plaintiff, Rachel Beard intermarried with William M. Beard in the State of Illinois. There was no marriage contract. Nine years later, in 1849, William came to Cali-

fornia, where he resided until his death. Rachel remained in Illinois. She never resided in California. William died in 1853, leaving some \$12,000 in real estate, mining property largely, all acquired by him in California after the passage of the Act of 1850. By his will, he left Rachel a legacy of \$500.00; the residue of his estate, he left to their infant daughter, Harriet A. Beard. Rachel accepted the legacy. She brought the suit against the executor of her husband's will, asking judgment for one-half of the community property, over and above the legacy which came to her from the will.

It has been seen that the Act of 1850, in effect when the Beard estate was acquired, and when the community was dissolved by the husband's death in 1853, did not, by express language, exclude testamentary power from the husband's "absolute power" to dispose. Was the testamentary power included? Could the husband, to use the language of the court, "convey the common property by devise or will, and thus defeat the rights of the surviving wife?" "This, we have no hesitation in saving, cannot be done." The statute of California. it was said, "has done away with the common law right of dower, and substituted in place a half interest in the common property." And the court describes "the rights of the surviving wife," it explains the "half interest in the common propertv":

"The words, 'with absolute power to dispose of,' ought not to be extended to a disposition The husband and wife, during by devise. coverture, are jointly seized of the property, with a half interest remaining over to the wife, subject only to the husband's disposal during their joint lives. This is a present, definite, and certain interest, which becomes absolute at his death, so that a disposition by devise, which can only attach after the death of the testator, cannot affect it, for such a conveyance can only operate after death, upon the very happening of which the law of this State determines the estate, and the widow becomes seized of one-half of the property."

But Rachel had accepted the legacy of \$500. Was she estopped thereby from setting up a claim to one-half of the estate? The court answers:

"It is a familiar principle, that an heir cannot take as a legatee, and afterwards dispute the validity of the will; but this principle does not apply in the present case. The deceased had no authority to dispose of but one-half of the property; this he might do to whomsoever he pleased. The plaintiff does not contest that right, but only seeks to withdraw her own property from the operation of a conveyance, which, it is claimed, has despoiled her of it. This she may do with the greatest propriety, as the legacy received by her was part of her husband's estate, and not her own."

Estate of Buchanan, 8 Cal. 507, 510, was decided in 1857. The lower court had held, as to property acquired by the deceased husband after April 17, 1850, the date of the California community statute, that the widow was entitled to half the property, independently of any disposition in the deceased husband's will; but as to so much of the property as was acquired prior to the Act of 1850, it was subject to the testamentary disposition of the husband. The widow appealed from so much of the decree as made property acquired by the community before 1850, subject to testamentary disposition by the husband. Mr. Justice Field, then at the Bar. was counsel for the widow. He argued that "our statute was a re-enactment of the Spanish or Mexican Civil Law, on the subject of the rights of husband and wife; that the property involved in the appeal, was, therefore, common property, and, as such, on the authority of Beard v. Knox, supra, was not subject to the testamentary disposition of the husband.

"The only question remaining to be determined," said the court, "is whether the property acquired by the testator during the marriage, but before the 17th of April, 1850, when the Act defining the rights of husband and wife took effect, was his separate property, or belonged to the partnership. This will depend upon the state of the law existing at the time. The law of Mexico in force here until our statute took effect, was the same, so far as relates to the merits of this question. The property belonged to the community, and upon the death of the husband, the widow took one-half. The husband had the power of disposition while living, but not by will, which could only take effect after his death." (Citing Schmidt's Civil Law of Spain and Mexico; also Beard v. Knox.)

In Smith v. Smith, 12 Cal. 217, decided in 1859, opinion by Mr. Justice Field, the court, referring to the language of the Act of 1850, namely, "the husband shall have the entire management and control of the common property, with the like absolute power of disposition as of his own separate estate," went on to say:

"But we think it clear that the law, notwithstanding its broad terms, will not support a voluntary disposition of the common property, or any portion of it, with the view of defeating any claims of the wife." (p. 225)

The action here was for divorce, and the wife was complaining of a transfer of community property by the husband, as having been made in fraud of her rights, to his children by a former marriage. The transfer to the children, in the first instance, was of real estate, the separate property of the husband. Long after the transfer of the land, the husband, with community funds, put up a building on it. It was held that the land, as the husband's separate property, vested in the children by his transfer. As to the building, "the husband having deliberately placed the building upon the property of his children, cannot himself have any claim upon it or its proceeds." The wife's interest in the building, erected out of the funds of the common property, was sustained as to her one-half. Its character "as common property" was declared, said the Court. "for the protection of the interest of the wife" (pp. 226-7). Beard v. Knox and Estate of Buchanan, supra, are cited to the point "that the common property could not be disposed of by the husband by will, so as to defeat the rights of the surviving wife," and the language of Beard v. Knox is quoted: "Our statute has done away with the common law right of dower, and substituted in its place, a half interest in the community property." As to the separate property of the husband, the plaintiff, his wife, "possessed no interest which the law could protect so as to restrain his power of absolute disposition, whether by sale or gift." That settled the question as to the mere land. But the building came out of the community funds. tiff did have an interest in those funds, in that building, which the law could protect, and did. "Its character as common property" was not declared in aid of the husband, who had "deliberately placed the building upon the property of his children"; it was declared "for the protection of the interest of the wife."

Meyer v. Kinzer, 12 Cal. 248, also decided in 1859, opinion by Mr. Justice Field, is the case to which we have had occasion to advert, in which it is said that the provisions of the Act of 1850, "are borrowed from the Spanish law, and there is hardly any analogy between them and the doctrines of the common law, in respect to the rights of property consequent upon marriage." Mr. Justice Field goes on to say:

"The statute proceeds upon the theory that the marriage, in respect to property acquired during its existence, is a community of which each spouse is a member, equally contributing by his or her industry to its prosperity, and possessing an equal right to succeed to the property after dissolution, in case of surviving the other. To the community, all acquisitions by either, whether made jointly or separately, belong. No form of transfer or mere intent of parties can overcome this positive rule of law. All property is common property, except that owned previous to marriage, or subsequently acquired in a particular way."

And he enforces the presumption attending the possession of property by either spouse—that it is their common property.

"The presumption, therefore, attending the possession of property by either, is, that it belongs to the community. Exceptions to the rule must be proved."

Scott v. Ward, 13 Cal. 459, 470 (April, 1859), came three months after Meyer v. Kinzer. Mr. Justice Field again writes the opinion, affirms the wife's present and definite interest, adopts and repeats the language of Beard v. Knox, supra, that "the husband and wife, during coverture, are jointly seized of the property, with a half interest remaining over to the wife, subject only to the husband's disposal during their joint lives"; and again, that "this is a present, definite and certain interest, which becomes absolute at his death." And in Noe v. Card, 14 Cal. 577, 603, (January, 1860), the same learned judge contrasts the national policy "of giving to the wife

a distinct interest in the property acquired during marriage," with the "opposite principle" that domestic happiness and public welfare "are best promoted by considering the acquisitions made during coverture, as belonging to the husband alone"; but as to this "opposite principle," he observes "that Spanish law viewed this matter in a very different light."

It does seem strange, then, we say it with very real deference, that this eminent judge should fall into the dictum of Van Maren v. Johnson, 15 Cal. 308, written in April, 1860. "Quandoque bonus dormitat Homerus." Van Maren v. Johnson is a story of marriages. Constantina Van Maren, while still unmarried, had rendered some services to Emily Wilson. Constantina then married Peter Van Van Maren. Emily did not pay the bill. Peter and Constantina, joined as plaintiffs, sued her for it. While this action was pending, Emily herself got married-to Levi Johnson, who was then brought into the case with her as a co-defendant. Evidently, before the action arrived at a judgment, the Johnsons had earned and acquired some community property; for the point was, whether this community property could be subjected for the payment of this bill, incurred, as it was, by Emily before her marriage.

The Act of 1850, with respect to "the debts of the wife contracted dum sola," as Mr. Justice Field points out, "renders the separate property of the wife liable, and exempts the separate property of the husband." It was silent as to the liability of the community property for such debts. Mr. Justice Field turned to the common law to fill the silence. Under that system, the matrimonial acquisitions were the exclusive property of the husband, and the absorption of the wife, person and property, in the status of the husband, was, in a sense, atoned for by subjecting the acquisitions to the debts of the wife, dum sola. Accordingly, Mr. Justice Field ruled that Constantina had a right to make her judgment out of the common property. That was Van Maren v. Johnson.

The liability of the common property to "the husband's creditors existing at the date of the marriage," to which Mr. Justice Field refers obiter. was not a point in judgment, but such property, he remarks, "is not beyond the reach of the husband's creditors existing at the date of the marriage," and, for the reason, as he assigns it, that "the title to that property rests in the husband." Here is the confusion, not an unfamiliar one, observed upon by this court in Arnett v. Reade, supra, "between the practical effect of the husband's power and its legal grounds"; for, in the same breath, Mr. Justice Field goes on, "he can dispose of the same absolutely, as if it were his own separate property." The power to dispose, and, along with it, the distinction inherent in the fact and the law, between common property of both husband and wife, and "his own" separate property,-these are the things that were moving in the writer's mind. In the next sentence, comes the troubling dictum, "the interest of the wife is a mere expectancy, like the interest which an heir may possess in the property of his ancestor"; and for this he cites, without comment, the obsolete case to which we had occasion to refer in discussing Reade v. DeLea and Arnett v. Reade, supra (Guice v. Lawrence, 2 La. Ann. 226; cf. Succession of Marsal, 118 La. 211; Succession of May, 120 La. 691; Beck v. Natalie Oil Co., 143 La. 154; Dixon v. Dixon's Executors, 4 La. 188; Louisiana Civil Code, Articles 915, 916, 2332, 2334-2399, 2402, 2406; Opinion of Attorney General of February 26, 1921, T. D., 3138; Liebman v. Fontenot, 275 Fed. 689).

Just a year later, is Packard v. Arellanes, 17 Cal. 525, 536-541 (April, 1861). The question there came up after the death of the wife. It was merely a question, in that event, of liquidation,-whether the husband, as the surviving member of the matrimonial partnership, should go on with his administration of the common property, and liquidate its debts in due course, without unnecessary resort to a formal probate administration in the matter of the estate of the deceased wife. Her estate in the common property, by the terms of the Act of 1850, descended to her heirs; but the heirs, of course, could not escape the community debts; and those debts, Mr. Justice Cope said, in writing the opinion, should be worked out through the husband, as the surviving partner. There was no other question for decision, no other point in judgment.

"The only question we propose to consider in this case," said Mr. Justice Cope, "is, whether, upon the dissolution of a marriage by the death of the wife, one-half of the common property is *subject to administration* under the provisions of the Act regulating the settlement of the Estates of deceased persons."

He notes the language of Section 9 of the Act of 1850, giving the husband control and management, with power of disposition, of the "common property,"-a control and management, and a power of disposition, which, it has been seen, attached, as well, to the separate property of the wife, except that her concurrence was required in an instrument of alienation or encumbrance. Mr. Justice Cope also notes the 11th section of the Act, by which, "upon the dissolution of the community by the death of either husband or wife, one-half of the common property shall go to the survivor, and the other half to the descendants of the deceased husband or wife. subject to the payment of the debts of the deceased; if there be no descendants of the deceased husband or wife, the whole shall go to the survivor, subject to such payment."

The ruling thought in Mr. Justice Cope's mind, was that of a matrimonial partnership, "the property of which, like that of any other partnership," is administered and liquidated by the husband in his capacity of surviving partner. His trouble came from the endeavor to reconcile the dictum of "expectancy," found in Van Maren v. Johnson, with the conception of a matrimonial partnership. This basic conception, he accepted from the Spanish Civil

law. "Our whole system by which the rights of property between husband and wife are regulated and determined," he says, "is borrowed from the Civil and Spanish Law, and we must look to these sources for the reasons which induced its adoption, and the rules and principles which govern its operation and effect." Accordingly, he goes on to say:

"The relation of husband and wife is regarded by the Civil Law as a species of partnership, the property of which, like that of any other partnership, is primarily liable for the payment of its debts. 'The law,' says Schmidt, in his work on the Civil Law of Spain and Mexico, 'recognizes a partnership between the husband and wife as to the property acquired during marriage.' The same doctrine is laid down by many other writers, and such seems to be the universal understanding of the nature of the marital relation in matters of property as viewed by the Civil Law. It is the well settled rule of that law that the debts of the partnership have priority of claim to satisfaction out of the community estate. (Citing Jones v. Jones, 15 Tex. 143.) Whether this rule prevails to its full extent, under our statute, it is unnecessary to determine, but it is certain that the Legislature intended to establish a similar relationship as to property to that existing in the Civil Lan."

The partnership relation is proprietary, of its essence. The management, control, power of disposition, of the partnership property, is a distinct conception. It is entirely competent to a partner, it is not unusual, by express contract, to confer upon a co-partner the exclusive management, control, and

power of disposition, of the partnership property (Cox v. Hickman, 8 H. L. Cas. 268, Opinion of Lord Cranworth; Beecher v. Bush, 45 Mich. 188, per Cooley, J.; Civil Code of California, Section 2489; Lindley on Partnership, Ewell's Second American Edition, bottom paging, 698). A partner whose relation to the partnership property is like the expectancy of an heir apparent in the property of his ancestor—"not to be deemed an interest of any kind," Civil Code of Cal., Sec. 700—is a contradictio in adjecto.

It was natural and logical to pass from the conception of a matrimonial partnership, to a liquidation of its affairs in due course, by the managing agent, in his capacity of surviving partner, without multiplying complexities by the introduction of a probate administration of the deceased partner's half, pending its transmission to her heirs by descent cast. Nothing more was needful to the disposition of the only question raised and decided in Packard v. Arellanes. But the dictum of Van Maren v. Johnson, an infant now a year old, was there, and Mr. Justice Cope undertook to conciliate it. Mr. Justice Abbott remarked, as we have taken occasion to notice, in Reade v. DeLea, supra:

"Until the interest of an heir in the estate of an ancestor who survives him will pass by his, the heir's, will, or descend to his heirs, the similarity declared in *Van Maren v. Johnson*, supra, lacks much of complete likeness."

Mr. Justice Cope, after stating the dictum of Van Maren v. Johnson, and quoting Febrero's

doubtful and mis-translated passage from *Guice v*. *Lawrence*, supra, meets the difficulty by a gratuitous and, be it said respectfully, unreasoned statement, that is to say:

"Where the marriage is dissolved by her death, her descendants succeed to the interest to which she would otherwise be entitled. They do not, however, succeed to such interest as a portion of her estate, but because it is vested in them by the statute."

If the heirs do not succeed to half the common property, to half the partnership estate, as a portion of the estate of the deceased spouse and copartner, it is not easy to understand how or why the Legislature should interpose and take from the husband one-half of property which was wholly and exclusively his. The heirs took, as, obviously, the Legislature intended they should take, by a descent east from the mother. Twenty-seven years after Packard v. Arellanes, the Supreme Court of California, in Johnston v. S. F. Sav. Union, 63 Cal. 554, 560, expressly held, speaking of just such heirs—

"as to the legal title of an undivided moiety of the land, descent was cast upon them on the death of their mother; the object of the suit was to sell and transfer their title, as well as that of their father. They had an interest to protect it."

And this language was repeated and approved, upon a second appeal of the case, in 75 Cal. 134, 141. The Supreme Court of California was not using the expression, "descent was cast upon them on the death of their mother," inadvisedly. "An

estate acquired by inheritance," the court said in *Estate of Donahue*, 36 Cal. 330,

"is one that has descended to the heir, and been cast upon him by the single operation of law. 'Descent or hereditary succession is the title whereby a man, on the death of his ancestor, acquires his estate by right of representation as his heir at law. An heir, therefore, is he upon whom the law casts the estate immediately on the death of the ancestor; and an estate so descending to the heir is in law called the inheritance'." (Citing Blackstone, in loco.)

The dictum of Van Maren v. Johnson, carried into Packard v. Arellanes, was soon repaired. Two cases, both of 1861, Ord v. DeLaGuerra, 18 Cal. 67, and Payne v. Payne, same volume, 292, restored the stream of decision to the course which it had consistently taken since 1855, when Beard v. Knox, supra, was decided.

Ord v. DeLaGuerra was written by Mr. Justice Baldwin, a student of Spanish and Mexican law and history, the author of the learned and celebrated opinion in Hart v. Burnett, 15 Cal. 530-630, in which the history and the law of Spanish Pueblos and their titles to land, were exhaustively treated. In the Ord case, no question of probate administration on the community estate of a pre-deceased wife, was up. The heir at law of the deceased wife proceeded directly, at first hand, as a plaintiff, to assert the rights of the heir by descent cast from the mother. The parents, Jose and Maria DeLaGuerra, intermarried in California in 1804. Maria died first, in 1843, intestate, leaving several children, of whom

the plaintiff was one. The spouses, at Maria's death, had accumulated some \$300,000 in community property. Jose, the surviving husband, did not die until 1858. During the interim of 15 years, since Maria's death, Jose went on administering the common property, much as he had done when Maria was alive, without inventory of the same, without accounting to the children. The children, other than the plaintiff, Mrs. Ord, made a settlement with Jose during his life, and released to him their interest in the community property. Mrs. Ord made no adjustment with him. Upon his death, she proceeded against his executors for an inventory and account of the common property, and for an adjudication to her of her share as an heir of her deceased mother. The Supreme Court of California upheld her. It recognized to the full, the estate of her deceased mother, as a co-partner of the community, and her own title, by descent cast, as the heir of that mother.

"By the Mexican law, as we understand it," said Mr. Justice Baldwin, "the husband was entitled to the use, control and disposition of the common property during the coverture. Upon the cessation of the matrimonial union by the death of the wife, the husband might still continue the possession of it, as surviving partner of the matrimonial union, and might sell or dispose of it in liquidation of the community debts. It is not necessary to decide, whether, under the Mexican system, he could sell or dispose of it for other purposes (the reference here, presumably, is to the error of Panaud v. Jones, 1 Cal. 513, brought out clearly in Thompson v. Craigg, 24 Tex 582), so as to pass title to third persons; for the will in this case asserts that portions of it were disposed of by him, and neither he nor his representatives could set up a want of power so to act, in answer to a demand for settlement of the share of the proceeds coming to the heir. The heir, by this claim, might affirm the sale, and hold the vendor responsible for the price, or her proportion of it. Upon the death of the wife, the children of the spouses succeeded to the interest, subject to the payment of debts. A court of chancery has jurisdiction to settle the account and ascertain the share and interest of the heirs. heirs do not claim as succeeding to the title of the father, but as succeeding to the title of the mother. There is no necessity, as we held in the case of Packard v. De La Guerra (not reported) for taking out administration upon the mother's estate."

The absence of such necessity, as we have indicated, was the only point in judgment in *Packard* v. Arellanes, supra.

Mr. Justice Baldwin goes on, in this firm language:

"The husband holds really as survivor of the matrimonial co-partnership; and as the remedy of the heir is governed by the laws now existing, we see no difficulty in giving to the right of the heir, whether arising out of a past system or the present, the same remedy which we would apply in the case of a representative at common law, claiming of a surviving partner, in a commercial partnership, distribution of partnership effects left, after the settlement of the firm debts, in the hands of such survivor. He holds, not as owner but as partner: first, to pay the debts—a duty devolving upon him by his relation to the deceased partner and to the creditors; and secondly, as trustee for the repre-

sentatives of the deceased, so far as their interest in the residue of the estate is concerned. His possession, lawful when assumed, continues for the purposes of the partnership and the duties of his trust; and he cannot, by his own act, without the consent or laches of the heir or representative, change, for his own benefit, the tenure by which he holds."

The running of the statute of limitations had been suggested. Mr. Justice Baldwin observes:

"In all such cases, we understand the rule to be that the Trustee cannot silently disayow the trust, and set up an exclusive holding in him-The holding becomes adverse only from the time when notice is given the beneficiary or cestui que trust of the individual claim of the trustee. But, if this were not so, the deceased was holding the property, in presumption of law, as well for the heirs as for himself. They were tenants in common with him in it; his possession was their possession; and he could not, merely by his own act of control or dominion as of his own property, however unequivocal, change the title and tenure, unless such acts and claims were brought directly to the knowledge of the heirs, and they assented or acquiesced. It is, moreover, held by the Civil Law, that when the husband keeps undivided the common property after the death of the wife, it is presumed to be done with the acquiescence of the heirs, and the effect is to continue the partnership." (Citing Escriche's Dic., verb. Bienes Gananciales, 368.)

Mr. Justice Baldwin sums up and cuts to the center:

"In the aspect in which this case is presented, it is the case of a claim, not to the estate left by Don Jose De La Guerra, but a claim to the estate of his deceased wife, to which estate the plaintiff succeeded upon her mother's death; the surviving husband being the trustee of the female plaintiff in this regard, and responsible to her as such."

Payne v. Payne is the other case in 18 California -at page 292. The opinion is by Mr. Justice Field. He makes full amends, if we may venture so to say, for the dictum in Van Maren v. Johnson. Theodore Payne died in San Francisco, in April, 1861, possessed of a large property in real estate in that city, and leaving a surviving wife and three minor children. The real estate was common property. His will, made in 1857, supplemented by a codicil of 1861, not material to the point here making, left "all my estate, real and personal and mixed, of every name and description, and wheresoever situate," to the surviving wife. The suit, an amicable one, was brought by the wife against the children "to determine the rights of the parties under the will of Theodore Payne." Mr. Justice Field held, and the court with him, that the surviving wife took onehalf of the common property "in her own right," by virtue of the community, and the other half as devisee under the will. Mr. Justice Field makes no mention of Van Maren v. Johnson, but goes upon Beard v. Knox, supra, the pioneer and leading case in which it was said that husband and wife "are jointly seized" of the common property "during coverture," and that her interest "is a present, definite, and certain interest." Of that case, Mr. Justice Field said:

"That case was decided in July, 1855, and the decision has never been questioned. It has furnished a rule under which property of vast amount and value has been distributed. We have no doubt of its correctness, and we only affirm and follow it, in holding, as we do in the present case, that the plaintiff took on undivided half of the common property in her own right by virtue of the community existing between herself and husband."

In *Hart v. Robertson*, 21 Cal. 346, 349, Mr. Justice Field, speaking of property which "belonged to the community existing between herself and husband," says of the wife:

"Upon his death, she succeeded, as his survivor, to one undivided half interest therein, the remaining interest descending to his heirs; as tenant in common with the heirs, she could maintain the present action for the possession of the entire premises against the defendant, who is a mere intruder thereon." (1863.)

We had occasion to refer to Fuller v. Ferguson, 26 Cal. 547, decided in October, 1864, in connection with the doubtful passage from Febrero. In 1837, the Municipal Authorities of San Francisco, then called Yerba Buena, granted a lot of land in that city to John Fuller, at that time the husband of Concepcion A. Fuller. In 1847, at the latest, Fuller turned over the west half of the lot to his wife, and ran a division fence between the two halves, and as early as 1838, the spouses formally acknowledged before the Alcalde of San Francisco that they had divided the lot between them. Concepcion sur-

vived her husband. The question in the case was between the heirs at law of the husband, as plaintiffs, and the claimants by title derived from the widow, as defendants.

The plaintiffs argued, as to the municipal fees, exacted for the issuance of the grant, that, even though Concepcion earned them, "she was absolutely prohibited from pretending to own any portion of them whatever-they all, each and every part and portion, belonged altogether and entirely to her husband himself as master of the community" (p. 556); and that John Fuller, by force of the grant, "became seized in his own right of a sole and separate estate in the lot of land so granted" (p. 565). And it was agreed by counsel that the grant, inasmuch as it was a grant by public authority, vested in John Fuller as separate property. It was also agreed that the moneys in the way of municipal fees advanced for the grant, were the common property of husband and wife, "the fruit of the wife's individual labor" (pp. 565-6).

Proceeding on these concessions, the court observed:

"Each of the spouses is entitled to an equal share in the community property, and they are liable equally to the losses and debts incurred during the existence of the conjugal partnership. During the existence of the marriage, the husband alone manages or administers the property of the partnership, and he can sell and dispose of it as he deems proper, provided he does so without intent to injure his wife." (p. 568.)

Conceding, as the court puts it, that the public grant, as such, "vested the title to the lot in the husband alone," still "the fees or charge exacted by the law for the grant were the joint or common property of the husband and wife." And this sum, so withdrawn by the husband from the partnership funds, "and used by him for his individual benefit, constituted a claim in favor of the community against the separate estate of the husband." And the court, after noticing the passage from Febrero in terms which we have heretofore quoted, goes on to say:

"Though the husband, in the case under consideration, might not have owed his wife a debt in the ordinary sense of the term, it does not therefore follow that he was not under an obligation to the community of which she was a member, in whose property she was equally interested with himself. He had used the money belonging to himself and his wife, which was necessary to obtaining a lot of land which by the grant became his separate property. This money was due from him to the community, and though the law afforded no means for enforcing its payment, it was not for that reason any the less due." (p. 570.)

### Again:

"In the case in judgment, there existed an obligation on the part of Fuller to restore to the community that which he had taken from it for his individual advantage, and though, perhaps, while he lived and the relation which he and his wife sustained to each other might continue, he could not have been compelled to perform it, yet he was competent to perform it

voluntarily, and thus discharge it in anticipation of the time when his separate estate might be required to reimburse the amount withdrawn by him from the property of the community." (p. 570.)

"The matrimonial partners," says the court, "could divide their common estate between them" (referring to the case from Louisiana of Labbes' Heirs v. Abat, 2 La. 565) (p. 571).

The court observes upon the admission by the counsel for plaintiff, "that if Fuller and his wife had acquired this lot by onerous contract, they could have divided it between them."

"There is no doubt," the court observes, "as to the correctness of this admission. In it is recognized the right of the wife to one-half the ganancial property, and also the power of the parties to contract with each other. Though Mrs. Fuller did not own one-half the lot by reason of the grant to her husband, she did own one-half the sum which was paid as fees for the grant made."

### And further:

"The exchange effected by the contract between the parties, was the assignment or transfer by him of the west half of the lot to her, in consideration of her interest in the demand which the community held against him, and which interest became, in legal effect, assigned to him by this contract." (p. 572.)

## And again:

"In the case of Fuller and his wife, there was not a division of community property, but an assignment of a portion of his separate prop-

erty for her interest in one of the items of the ganancial assets." (pp. 572-573.)

Morrison v. Bowman, 29 Cal. 337, decided in 1865, is a clear recognition of the wife's interest in the community property as a proprietary one. Referring to the estate, as it was at the time of the death of the husband and testator, the court said:

"At the time of his death, he left surviving him his wife, Manuella T. Smith, who was the mother of three of his children. He also left surviving him four other children, the offspring of a former marriage. At the time of his death, he owned the Bodega Rancho, consisting of eight leagues of land, and he and his wife owned the Blucher Rancho, consisting of six leagues, as common property."

Surely, the differentiation could not be happier or more exact. The court found, from the terms of the husband's will, regard being had to all its provisions, that the "proprietary right" of the wife in half the community property, was not open to super-addition by a testamentary provision made for her in the will, since this would be so repugnant to the dispositions of the will as to defeat them. The presumption was, that the testator, in making provision for his wife, meant to dispose, not of her property, but of his own, and that, in the absence of an intention in the will to the contrary, she would take the provision out of his estate, over and above her own estate in the common property. It was quite admissible, however, for the testator to make the provision for her, out of his own property, conditional,—dependent upon her acceptance of it in lieu of her interest in the common property. The will might express that intention in direct terms, in so many words; or its provisions, by and large, might, as in the case before the court, be inconsistent with any other intention. In such event, then, the wife would be put to her election.

"The intention of the testator," said the court, "is to be kept in view as the pole star in the construction or interpretation of his will; and it is not to be presumed, in the absence of a manifest intent on his part, that he designed to make a disposition of any property not his own."

# Again:

"While it is the law that a testator can only dispose of his own property, he may assume to dispose of that which belongs to another; and such disposition may be ratified and confirmed by its owner, by the acceptance, under the will, of a donation, necessarily implying such ratification and confirmation."

The court goes on to say, citing the Louisiana case of *Theall v. Theall*, 7 La. 226,

"that a wife entitled to half the gananciales, may accept a bequest under the will of her husband, without thereby surrendering her *proprietary* right to half the community property."

And the language is repeated from I and v. Knox, supra:

"This she may do with the greatest propriety, as the legacy received by her was part of her husband's estate, and not her own."

We have heretofore drawn this court's attention, in speaking of the Constitution of 1849 and the legislation thereunder, to the case of *Dow v. Gould and Curry Mining Company*, 31 Cal. 630. It was in this case, that the court, after giving the words of the Constitution "in relation as well to her separate property as to that held in common with her husband," used the memorable language:

"It is not expressly declared what right or title she shall possess in the common property, nor is common property defined; but at the time of the formation of the constitution, it was a term of well-known signification in the laws then in force, and a right on the wife's part in property of that character, was recognized by the Constitution. No distinction between the nature of the rights to be defined, as they may relate to either of the two classes of property. The language does not tend to is indicated. show that while, as to the common property, the legislature may prescribe her rights, as to her separate property authority was given to prescribe only matters of form. But without going to the length of saying, that by the recognition of the right of the wife in the common preperty, her title became fixed beyond the reach of legislative alteration, it is sufficient to say that it is incredible that the framers of the Constitution, in committing to the Legislature the same authority in the same terms over two subjects having an intimate relation, should have intended that the Legislature should exercise plenary control over the one, and only the most limited and almost immaterial power over the other." (31 Cal. pp. 644-5.)

The Dow case was decided in January, 1867. In October, 1866, Peck v. Brummagim, in the same

volume, p. 442, was before the court. George Peck, the deceased husband, died intestate on June 13, On February 5, 1863, when he was worth "upwards of \$75,000, and owed no debts," he bought a 50 Vara lot in San Francisco from Thomas Young, for \$3800, assuming a mortgage of \$900 then on the property, and directed the grantor to convey the lot to Polly Peck, his wife, declaring that he intended to make the lot a gift to her. "The purchase money was paid out of the common property." Thereafter, and before Peck's death, he spent, out of the common property, about \$18,000, in putting up a building on the lot. The deed to Polly Peck recited the consideration as having been paid by her, "without stating whether it was her separate property or the common property of the spouses," and recited that she was the wife of George Peck.

When Peck died, "he was largely indebted, but none of the debts were contracted until more than one year after the lot was conveyed to his wife." If the lot and house should be taken to be Mrs. Peck's separate property, the proceeds of the husband's estate would not pay all the creditors. Brummagim, the defendant, as administrator of the estate of the husband, claimed that the house and land were common property, liable for the debts of the husband, and he was proceeding in the probate court for an order of sale. Mrs. Peck brought suit to enjoin the sale, and to have the property in question declared her separate property—making the

creditors of the estate defendants along with the administrator.

"There is no rule," said the court (p. 446), "prohibiting the husband from making, or restricting him in making, a gift of land that is not applicable to a gift of money. The heirs occupy the place of their ancestor, and cannot claim any other or greater right in the property than he could maintain. If the intended gift is found to have been so made as to be legal and valid as to him, it will be equally binding upon the heirs, for they succeeded only to such right or title in the land as he held at the time of his death."

"No good reason is perceived," the court goes on, "why the husband, while free from debts and liabilities, may not make a gift to his wife of either real or personal property, which, at the time, was the common property of the husband and wife. The statute confers upon him the like absolute power of disposition of the common property as of his own separate estate, but there is this necessary restriction (cf. Civil Code, Sec. 680, heretofore quoted) upon his power, that he cannot make a voluntary disposition with the view of defrauding or defeating the claims of the wife,-as was held in Smith v. Smith, 12 Cal. 216. This springs from the relation of the parties, and their title to the property, both spouses being jointly entitled to the property, though the husband has the entire management and control of it, and can pass the title in his name alone. All persons occupying a fiduciary relation, are, in like manner, disabled from disposing of the trust property for the purpose of defrauding those who are interested in it."



Certainly, this language is anticipatory of what was afterwards said by this court in *Warburton v*. White and in Arnett v. Reade, supra.

The money expended by Peck in building the house, "was the community property of the plaintiff and her husband—the question is, who was the owner of the house when it was built under those circumstances? It admits of only one answer, the owner of the lot was also the owner of the house." In the absence of any purpose to defraud, the general creditors, "like the administrator, are limited by the lines bounding the rights of the husband." As to him, "He had no right or title to the premises, including both the house and lot in suit" (pp. 449-450). Accordingly, Mrs. Peck prevailed.

# Galland v. Galland, and DeGodey v. DeGodey.

These two cases concerned the rights of husband and wife, in situations inter vivos, in respect to the common property. We have had occasion to refer to the Galland case, 38 Cal. 265, decided in July, 1869, afterwards, in principle, codified in Section 137 of the Civil Code. The wife brought suit against the husband. It was not a suit for divorce. No divorce was asked for. The wife sued, on the foot of her interest in the common property, for the allocation to her of part of that property, for her suitable maintenance, and the equity on which

her suit turned was the delinquency of the husband in the discharge of his "fiduciary" duty as manager "of the trust property" (*Peck v. Brummagim*, supra). The court sustained her in the suit.

"At common law," said the court, "the wife had no interest except her right of dower in the estate of the husband, acquired either before or after the marriage. The right of dower depended on the fact, whether or not she survived the husband. Even her own estate, unless settled to her sole use, became, to a great degree, merged in his. But under the laws of this State, the wife not only retains her separate property,—but that which is earned during the marriage becomes the common property of the husband and wife; and though it is subject to his control as the head of the family, whilst the marriage continues, vet, if the wife survives him, or if the marriage relation be dissolved by a decree of the court, except for the adultery or extreme cruelty of the wife, she is entitled to one-half of the common property then remaining. The theory on which right is founded, is, that the common property was acquired by the joint efforts of the husband and wife, and should be divided between them. if the marriage tie is dissolved either by the death of the husband or by the decree of the court, unless the wife shall have forfeited her right by committing an act of adultery, or extreme cruelty; and even then, the court pronouncing the decree is authorized to apportion the property at its discretion. With these liberal provisions for the wife, who has a joint and equal interest with the husband in all property acquired during the marriage, it would present an anomaly in jurisprudence if the husband, without cause, could drive his wife from his house without any provision for her support, and appropriate the entire common property and its income to his own use, whilst the courts would be powerless to compel him to set apart a portion of the property for her support, unless she coupled with her application a prayer for a divorce."

DeGodey v. DeGodey, 39 Cal. 158, was decided in April, 1870. In May, 1869, the husband obtained a decree of divorce. "In his complaint in the action for the divorce the appellant (husband) did not state that there was any property whatever belonging to the community, nor ask for any judgment or determination concerning it." The decree was rendered without the appearance of the respondent, and it was entirely silent as to the distribution to be made of the common property. Thereafter the divorced wife sued her former husband "to recover her share of the community property." Neither by judicial action, nor by any contract inter partes, had the husband's title to the community property, whatever that title was, been qualified or altered. If he, during coverture, had been the exclusive owner, if the wife had but a phantom expectancy-"not any interest at all," Civil Code, Sec. 700-the former wife, in her suit, would appear to be leaning on a broken reed. But the court held that, during the marriage, "her right in the community property was as well defined and ascertained in contemplation of law, as that of the husband," and that, automatically, when his agency as head of the community ceased by the divorce, his wife became tenant in common with him of the community estate. The language of Mr. Chief Justice Wallace, writing the opinion of the court, is as follows:

"Under the provisions of the statute, property which is acquired during the marriage, unless acquired by gift, bequest, devise or descent, is common property. It belongs to the matrimonial community, and not less to the wife than to the husband. It is true that the interest of the wife therein pending the marriage has been termed 'a mere expectancy' (Van Maren v. Johnson, 15 Cal, 311); but while, perhaps, no other technical designation would so nearly define its character, it is, at the same time, an interest so vested in her as that the husband cannot deprive her of it by his will (Beard v. Knox, 5 Cal. 256), nor voluntarily alienate it for the mere purpose of divesting her of her claims to it. (Smith v. Smith, 12 Cal. 226). The theory upon which the right of the wife is founded (as we said in Galland v. Galland, 38 Cal. 265), is, that the common property was acquired by the joint efforts of the husband and wife, and should be divided between them if the marriage tie is dissolved either by the death of the husband or by the decree of the court. Her mere right in the community property is as well defined and ascertained in contemplation of law, even during the marriage, as is that of the husband. It is true that the law confers upon the latter the authority to manage and control it during the existence of the marriage, and the power to sell it for the benefit of the community, but not, as we have seen, so as to defraud the community of it. In the case at bar, then, the right of the respondent to a share of the property in question, if it be proven to be community property, is clear. accrued to her, as having been acquired in part by her own efforts, before the decree of divorce was rendered; that decree as rendered did not

deprive her of it. The effect of the decree, acting upon her personal status, was to remove from her the disability, theretofore, as we have said, almost total, to sue concerning it, or to interfere in anywise in its control. Under the operation of that decree, too, the appellant, ceasing to be husband, was no longer the head of the community, which had itself ceased to exist, and, as a consequence, he lost the exclusive control and the somewhat absolute power to dispose of the community property; thenceforth the parties stood upon equal ground in that respect, and neither could wholly exclude the other from a participation in the property and its present disposition." (pp. 164-5.)

#### Broad v. Broad, 40 Cal. 493.

This case was decided in January, 1871. It was an action for partition. The land was community property. The mother died, leaving, surviving her, the father and their children. The children, as plaintiffs, brought the action against the father, claiming as tenants in common with him.

"The main question in the case, as both parties consider it," said the court, "is whether, upon the death of the defendant's wife (she died in 1858), one-half of the property vested in the plaintiffs. The eleventh section of the Act of 1850, defining the rights of husband and wife,—which was in force at the death of the wife of the defendant—is as follows: 'Upon the dissolution of the community by the death of either husband or wife, one-half of the common property shall go to the survivor, and the other half to the descendants of the deceased husband or wife, subject to the payment of the debts of the deceased. If there be no descendants of the deceased husband or wife, the whole

shall go to the survivor, subject to such payment.' There is no room for construction, so far as this question is concerned, except as to the meaning of the words 'shall go.' As related to the survivor of the community, there can be no doubt that those words mean 'shall vest.' The survivor takes one-half of such title as the community held. The same words are necessarily implied in the clause of the section which speaks of the acquisition of title by the descendants of the deceased husband or wifethat is to say, 'the other half (shall go) to the descendants of the deceased husband or wife.' Those words have the same signification in each instance; and there is nothing in the language of the Act, which would tend to assign them a meaning in the one case different from that given in the other. They take title of the same nature, and to the same extent, as that which vests in the survivor."

It was accordingly held that the children, upon the death of their mother, became tenants in common with the father, and that partition should be made accordingly. The court remarks that the amendment of 1861 to section 11, providing that "upon the death of the wife, the entire common property should go to the surviving husband," was passed from considerations of expediency,—to obviate "inconveniences and perhaps hardships" such as might be apprehended if the surviving husband's management and control were interrupted.

Broad v. Broad was re-affirmed and followed in Broad v. Murray, 44 Cal. 228 (July, 1872); again, in Johnston v. Bush, 49 Cal. 198, 201-2, wherein the interest of the children of the deceased wife, "in

the common property," is described as that "which they had inherited from their mother" (October, 1874). Broad v. Broad, and Broad v. Murray are both cited in Cook v. Norman, 50 Cal. 634, which sustained a conveyance of the common property by the surviving husband, "necessary to provide for the payment of the community debts." This holding, it was said, "is not opposed by the cases of Broad v. Broad, and Broad v. Murray." The Broad case is again affirmed, and, as well, Broad v. Murray, and Johnston v. Bush, supra; and the language of Cook v. Norman, supra, "it is not doubted, as against the husband, the interest of the children of the community is to be taken as vested," is quoted,—in Plass v. Plass, 121 Cal. 131, 134, and the Plass case cites Johnston v. S. F. Savings Union, 75 Cal., p. 141, previously noted by us, in which the court, approving the language in 63 Cal. 560, on the former appeal, holds, in respect to the title of the children to the common property, at the death of the pre-deceasing wife:

"As to the legal title of an undivided moiety of the lands, descent was cast upon them on the death of their mother."

### Greiner v. Greiner and Estate of Rowland.

In among all these decisions, *Greiner v. Greiner*, 58 Cal. 116 (May, 1881), finds its way, a sort of judicial waif or nondescript. Caroline Greiner brought suit against her husband and some transferees of his; the gist of her complaint was that the husband was manipulating the common property, and disposing of it to these transferees, for

the purpose of defrauding her. The lower court sustained a demurrer to the complaint. On appeal, Mr. Justice Thornton wrote an opinion for reversal upon the ground that the wife, in any event, on the allegations of her complaint, was entitled to a decree that one of the defendants held two notes and mortgages for her benefit, to the extent that Caroline's separate funds had been used by the husband to relieve this particular property of a lien in the hands of such defendant. But Mr. Justice Thornton, misled by the dictum in Van Maren v. Johnson, supra, went on to say that "prior to the adoption of the code," the common property vested in the husband, and he seemed to put this on the confused ground that the husband, during the coverture, could dispose of such property absolutely, as if it were his own separate property. must be quite evident that the learned justice makes this statement too much at large, and without just abatement. And he likens "the interest of the wife" to "a mere expectancy, like the interest which an heir may possess in the property of his ancestor." Of course, he got that from Van Maren v. Johnson, which he cites; but the extraordinary thing is, that, side by side with Van Maren v. Johnson, he cites, without comment, DeGodey v. DeGodey, 39 Cal. 164. We have said enough, it is hoped, touching DeGodey v. DeGodey, to show the utter inappositeness of that citation. Indeed, Mr. Justice Thornton has his relentings, for he goes on to say:

"It may be that the interest of the wife is sufficient, while the coverture exists, on a complaint properly framed, of the character of a bill quia timet, to procure an injunction to restrain the husband from carrying out a threatened fraudulent transfer of such property, which would result in loss to her."

Did Mr. Justice Thornton conceive that an "heir apparent", with his "expectancy", could maintain such a bill?

But one Justice concurred in the opinion of Mr. Justice Thornton.

"Morrison, C. J., concurred in the judgment of reversal, but did not concur in the views expressed by Mr. Justice Thornton respecting the right of the husband to dispose of the community property by gift."

Mr. Justice Myrick, the other participating Justice, said:

"I concur in the judgment, upon the ground that the court erred in sustaining the objection to the testimony offered (the court below, at the threshold of the trial, when the first question was put to the first witness, had sustained an objection thereto upon the general ground that the wife's complaint was demurrable for want of facts); and upon the ground that plaintiff is entitled to relief by reason of her separate property being used as alleged. From the other views expressed in the foregoing opinion, I dissent. I do not think that a husband has the right to give away common property to the injury of or in fraud of the wife, nor do I think that she must wait until the community is dissolved, before attempting to redress the wrong. His right to manage and dispose of the community property, must be exercised in endeavors to preserve or use it for their common benefit, not to give it away."

Estate of Rowland, 74 Cal. 524, (January, 1888), only adds, by a dictum, to the confusion of Mr. Justice Thornton's opinion in Greiner v. Greiner. The deceased, Jane Rowland, by her will, disposed of property of considerable value to her testamentary nominees. The surviving husband was mentioned in the will as a legatee, to the extent of one dollar. The probate court, in the exercise of its special jurisdiction, entered a decree distributing the property to the persons named in the will. The husband, as to a part of that property, claimed that it was community property, no part of the disposable estate of the pre-deceased wife. He appealed from the decree of distribution. The opinion on appeal went, as it was constrained to go, on the turning proposition that "appellant does not claim under or through the estate, but adversely and in opposition thereto"; and it was observed "that the law does not contemplate or provide for the distribution of property in the hands of the executor or administrator, to persons who may claim adversely to the estate, but leaves all such questions to be determined by action on behalf of or against the executor." The adverse claimant, in this instance the husband, was not concluded by the decree of distribution. That operated only upon the heirs or legatees or devisees, or those holding under them; it was a proceeding "under or through the estate, not adversely and in opposition thereto." considerations decided the appeal from the decree of distribution against the husband.

But the opinion, gratuitously, if we may so say, goes on to speak of "the estate in expectancy" of the wife in the community property, as dependent upon her survivorship, "and in the event of her death before her husband, it is deemed never to have existed." This statement, erroneous, it must be said, and unnecessary, is preceded by a reference to the 11th section of the Act of 1850-that, upon the death of the wife, one-half of the community property vested in her descendants; and Payne v. Payne, 18 Cal. 291, is cited without comment,-a case, in which, as we have shown from its text, "the present, definite, certain interest of the wife," during coverture, in the common property of which "both husband and wife are jointly seized," is vigorously asserted.

### It is next said that

"the amendment of 1874" (meaning the Civil Code), "contained in Section 1401, quoted above (that upon the death of the wife, the entire community property, without administration, belongs to the surviving husband), has changed the rule in this respect; and as to the community property, the husband does not, upon the death of the wife, take by succession."

The confusion here involves, first, a mistake of historical fact; and, second, an antinomy of judicial decision. As to the fact, this amendment of 1874 was not the thing that changed the rule of Section 11 of the Act of 1850, as originally written. We have just had occasion to notice, in citing *Broad v. Broad*, 40 Cal. 493, 497, that the change was made

by the Act of 1861, amendatory of Section 11, passed, from considerations of expediency, to obviate the possible inconvenience, perhaps hardship, of interrupting the administration of the common property, by the surviving husband as managing agent and partner. As to the antinomy: The statement that, "as to the community property, the husband does not, upon the death of the wife, take by succession," is directly opposed to the statement, later made in Estate of Burdick, 112 Cal. 387, that the husband succeeds as the heir of his wife,—a case to which we shall presently refer. Indeed, this unfortunate excursion of the Rowland opinion into the region of dicta, seems to persist in making the confusion worse confounded; for, in the sentence next following the reference to the wife's "estate in expectancy," it is said:

"If we are correct in this, the husband does not, upon the death of his wife, as to the community property, take by descent or succession, but holds the community property as though acquired by himself, and as if his deceased wife had never existed."

Language such as this, is a solemn warning against the improvidence of dicta.

### Estate of Burdick; Spreckels v. Spreckels.

Estate of Burdick, 112 Cal. 387, and Spreckels v. Spreckels, 116 Cal. 339, the one the forerunner of the other, written by the same judge, Mr. Justice Temple, were decided, respectively, in April, 1896, and March, 1897.

In the *Burdick* case, the lower court, sitting in probate, found, on settling the final account of the executor of the will, that there remained in his hands, subject to distribution to those entitled thereto, the sum of \$1657. The court thereupon directed that this money be distributed as community property, one-half to the surviving wife, the other half to the sole legatee of the testator.

It was argued for the executor, as appellant, that the claim of the surviving wife, recognized by the court below in its direction for a distribution of the money, was a claim adverse to the estate of the testator; and that the probate court had no jurisdiction to determine adverse claims of that character -its jurisdiction was limited to the claims of heirs, devisees or legatees, deriving through the testator or intestate, as the case might be. Mr. Justice Temple readily conceded that the jurisdiction of the probate court was limited to the determination of rights arising out of succession from the intestate, or testamentary disposition from the testator, and that the adjudication of claims adverse to the estate of the decedent must be left to an independent action. But he found it necessary to say that the probate court, in dealing with the wife's portion of the community property, had no jurisdiction "unless she takes upon the death of the husband as heir." And she did take as heir, he went on, because she had no interest or estate in the community property, nothing but the mere expectancy of an heir apparentthe exclusive ownership was in the husband; and by a queer twist of verbal logic, he thought, too, that the husband, surviving the wife, took half the community property from her as her heir. "Can such things be, and overcome us like a summer cloud, without our special wonder?" The husband, exclusive owner of the "common property," comes into half of his own property, at the death of his wife, as her heir. The wife, with the mere expectancy of an heir apparent—"not any interest at all"—transmits half of the common property to the exclusive owner thereof, the husband, by a descent cast.

Mr. Justice Harrison and Mr. Justice Garoutte, in their concurring opinion, affirmed the order distributing half the common property to the wife, upon the plain ground that she had a vested interest therein, which the law subjected, along with the husband's half, to the payment of the debts of the estate in probate liquidation, and that, of necessity, the probate court, in ascertaining and charging debts against the community property, was clothed with jurisdiction to find out what that community property was, what it owed, and what surplus, after payment of the debts, was left, if any, for distribution. They rejected, toto coelo, Mr. Justice Temple's notion of the wife's expectancy and heirship.

It goes without saying, that Mr. Justice Temple proceeded on the dictum of Van Maren v. Johnson, supra, repeated in Packard v. Arellanes, supra, in respect to the wife's expectant heirship touching her own half. He next takes up the husband's heirship in the wife's one-half,—the inheritance of a "mere

expectancy." Section 1400 of the Civil Code deals with "inheritance of husband and wife from each other," and provides that the preceding sections of this title (being the Title on Succession, and particularly Section 1386, with its nine subdivisions, providing for the "succession to and distribution of estate of deceased persons," and how "it is succeeded to and must be distributed") "as to the inheritance of the husband and wife from each other apply only to the separate property of the decedents." Mr. Justice Temple finds in the next section, Section 1401, the heirship of the husband, in respect to half the community property, on the death of the wife. "The next section," he says, "gives the entire community property to the husband, on the death of the wife, 'without administration,' What was the necessity of this provision, 'without administration'," he asks, "if it does not go by succession?" He pretermits, it may be noted, the reason for the amendment of 1861, to the Act of 1850, repeated in the section of which he speaks, by which the devolution of the predeceasing wife's half, to her descendants, in exclusion of the husband, was amended to put the entire community property in the surviving partner. The reason was one of policy and expediency, as explained in Broad v. Broad, supra; it was to obviate the inconvenience and possible hardship of interrupting the administration of the community property by the husband as the surviving matrimonial partner.

It would be difficult to produce a more unfortunate example of verbal logic than the following passage from Mr. Justice Temple's opinion:

"The suggestion that the husband takes from the wife her share of the community property upon her death by succession, may seem inconsistent with the proposition that during her life she had no estate of any kind in the property. That she had no estate in the community property-vested or contingent-was held by this court when the law was, that upon her death one-half of the community property was inherited by her next of kin. (We beg to say, that this was never "held" by the court, there is no warrant for the statement except the dictum in Packard v. Arellanes, supra, and the estate of the wife was clearly recognized and pronounced, within a year, in Ord v. De La Guerra, 18 Cal. 74-75.) The change was made by amendments which are codified in Sections 1401 and 1402. and which merely change the succession. It was competent for the Legislature to provide the mode in which the wife's expectancy (we would interpolate, "no interest of any kind," Civil Code, Section 700) should pass to the husband. It might have done this by creating a right of survivorship as an incident to the estate, but it has done this by providing for a succession."

The wife, then, succeeds to half as the heir of the husband—all else, so far as she is concerned, is declared to be "a mere expectancy." The husband succeeds to half as the heir of the "expectancy" of the wife—all else, as to him, in respect of that half, must be a mere expectancy. The unfortunate "common property," like the Trojan hero of the

Iliad, hard beset, favored, not of man, but of the deus ex machina, is rapt away in some sort of supernatural mist.

We would contrast, with this specimen of verbal logic, the concurring opinion of Mr. Justice Harrison and Mr. Justice Garoutte, written by the former:

"The wife's interest in the community property, upon the death of the husband, has many incidents similar to those of an heir, but I do not think that, under the language and spirit of the laws of this state, she can be said to be his heir to her share of that property, or that her interest therein comes to her by virtue of a 'succession' to the property of her husband. The property that is acquired by the labor of the wife during the marriage, equally with that acquired by the labor of the husband, becomes community property; and although Section 172 of the Civil Code gives to the husband the management and control of the community property -that acquired by her labor as well as that acquired by his-yet, by the terms of the same section, he cannot give away, or convey without valuable consideration, any portion of this property, unless she gives her written consent there-While a voluntary or fraudulent convevance is binding upon his heirs, and, in the absence of creditors, cannot be questioned by the administrator of his estate, yet he cannot by such act deprive the wife of her share of the community property. Only one-half of the community property is subject to the testamentary disposition of the husband, and if the bonds of their marriage are dissolved by a judicial decree which makes no mention of the properties, the wife becomes the absolute owner of one-half thereof, as co-tenant with the husband. DeGodey v. DeGodey, 39 Cal. 157.

"It was said in this case: 'The theory upon which the right of the wife is founded, is, that the common property was acquired by the joint efforts of the husband and wife, and should be divided between them if the marriage tie is dissolved, either by the death of the husband or by the decree of the court. Her mere right in the community property is as well defined and ascertained in contemplation of law, even during the marriage, as is that of the husband. It is true that the law confers upon the latter the authority to manage and control it during the existence of the marriage, and the power to sell it for the benefit of the community, but not, as we have seen, so as to defraud the community of it. In the case at bar, then, the right of the respondent to a share of the property in question, if it be proven to be community property, is clear. It accrued to her as having been acquired in part by her own efforts before the decree of divorce was rendered. That decree as rendered did not deprive her of it.'

"Although this interest of the wife in the community property may not fall within the common-law definition of an 'estate,' it is not to be classed as a 'mere possibility' like the expectancy of an heir. It is true that in Van Maren v. Johnson, 15 Cal. 311, it was, by way of illustration, termed a 'mere expectancy,' and this illustration was again used in Packard v. Arellanes, 17 Cal. 525; but, as was said in DeGodey v. DeGodey, supra: 'While, perhaps, no other technical (italies by Mr. Justice Harrison) designation would so nearly define its character, it is at the same time an interest so vested in her as that the husband cannot deprive her of it by his will, nor voluntarily alienate it for the mere purpose of divesting her of her claims to it.' That her interest in the community property is more than a mere possibility, is also shown by Section 167 of the Civil Code, by which the community property is exempt from liability from the contracts of the wife made after marriage (the husband is then sole manager), but it is not exempted by the code from liability for her contracts made be-

fore marriage.

"It is a misapplication of terms to say that the property which the wife has 'acquired' (quotation marks, identifying "acquired," by Mr. Justice Harrison) during the marriage, by her skill or labor, and of which her husband had not, in his lifetime any power of voluntary conveyance, except with her consent, or of testamentary disposition, is inherited from him; and to refer her rights in the community to 'succession,' under the language of Section 1383 of the Civil Code, begs the entire question.

"Succession, by the terms of that section, can be applied only to a case where the property succeeded to belonged to the decedent; whereas the entire provisions of the Civil Code are at variance with treating the husband as the owner of the community property. If he were the owner, he would have the absolute dominion over it, with the right to use it or dispose of it, according to his pleasure Civ. Code, Sec. 679); but, as above seen, these attributes of ownership are denied him. Section 682 of the Civil Code specifies the community interest of husband and wife, as one species of property which is owned (Italics by Mr. Justice Harrison) by several The necessary implication therefrom is, that the husband and the wife are the 'several persons' in whom is vested this ownership of the community property. This ownership is not absolute in either, but in each of them is qualified by reason of its being shared with the other, (Civ. Code, Sec. 680.)"

Turning, now, to the control by the probate court of the entire community property, at the death of the husband, for purposes of liquidation, Mr. Justice Harrison proceeds to say:

"The interest of the surviving wife in the community property, instead of being adverse to the administrator of the estate of her husband, is subordinate thereto for all purposes of administration, and is subject to the supervision and control of the court in which the administration is pending. By Section 1452 of the Code of Civil Procedure, the executor or administrator is entitled to the possession of all the real and personal estate of the decedent, and to receive the rents and profits of the real estate during the administration, and Section 1402 of the Civil Code declares, 'In case of the dissolution of the community by the death of the husband, the entire community property is equally subject to his debts, the family allowance, and the charges and expenses of administration.' Theller v. Such, 57 Cal. 447, and kindred cases, have, therefore, no application, as the property involved in those cases was held not to be subject to the administration, or to the debts of the deceased. The husband has the sole management and control of the community property in his lifetime, and alone can render that property chargeable with debts: upon his death, the entire community property, as well as his separate property, is subject to the control of the court for the purposes of administration of his estate, and is taken into the possession and management of his administrator for these purposes; and at the close of the administration, the wife receives, at the hand of the court, in the same manner and at the same time as does the heir, her share of the community property—the one-half of the surplus after paying the debts and expenses of administra-She receives it, however, not as the heir of her husband, but in her own right, as her half of the property which was acquired by herself and her husband during the marriage, but freed from all restrictions in its use and enjoyment, and with the same title as if the marriage had been dissolved by a decree of divorce.

"As the court which had control of the administration, and of the community property for that purpose, is also authorized to determine what charges, debts and expenses are to be paid out of this property, and the amount thereof,-it must follow, that the judgment of that court, determining the amount of the property which she is entitled to receive at the close of the administration, is binding upon her, and may also be invoked by her as a determination of her right to the same. Whether this be called a decree of distribution, or a judgment or order fixing the amount or extent of her interest in the estate, and her right to receive the same from the administrator, is immaterial. It is the final determination of the court upon a subject within its jurisdiction, and is as binding upon her as if she had been specifically named in Section 1666 of the Code of Civil Procedure. If a court has jurisdiction to take the management and control of property, and to determine the amount of charges thereon and direct their payment out of the property, and return the surplus to the parties entitled thereto, its judgment in determining the amount of such surplus, and designating the persons to whom it is to be given, is necessarily conclusive upon them, and they take their portions of the surplus under and by virtue of the judgment, and not adversely thereto."

See Garzot v. de Rubio, 209 U. S. 283, 299-305.

Spreckels v. Spreckels, 116 Cal. 339, is Mr. Justice Temple's corollary to the *Burdick* case. Claus Spreckels and Anna C. Spreckels, the parents of

Rudolph Spreckels, intermarried, July 11, 1852. On July 31, 1893, the husband, without the written consent of the wife, independently of her consent, made a gift of some corporate stock to the son. The husband and wife sued the son to recover that stock.

The amendment of March 31, 1891, to Section 172 of the Civil Code, requiring the written consent of the wife to a gift by the husband of any portion of the community property, was later, by some years, than the date of the matrimonial acquisition of the property in question. At the time when the property was acquired, the husband was not disabled, as we have had occasion to notice, from making "in the absence of fraudulent intent, a voluntary disposition of the common property, reasonable in reference to the whole amount" (Lord v. Hough, 43 Cal. 581, 585). As Mr. Chief Justice Beatty remarked, in his specially concurring opinion in the Spreckels case:

"It does not appear that the amount of the gift was so disproportionate to the amount of the community property, as to endanger the right of the wife to her full share on the dissolution of the community, or to deprive the husband of the means of supporting the wife and others dependent upon him; in short, it does not show any present or prospective injury to her, and he, of course, has no ground of complaint."

If, therefore, Mr. Justice Temple, construing the amendment of 1891 prospectively, not restrospectively—as indeed he did—had adjudged the validity

of the gift in the light of what is said in *Lord v*. *Hough*, supra, and of what the Chief Justice, as just quoted, had said in his specially concurring opinion, it would not have been necessary to examine into the precise nature of the wife's interest in the common property,—the case would have gone off upon the exercise by the husband of his power of disposition over the community estate. That was the only question involved as this court took occasion to say in *Warburton v*. *White*, 176 U. S. 484-497.

But Mr. Justice Temple, here, as in the *Burdick* opinion, went beyond the requirements of the case before him.

"This court," he said, "has held, after mature consideration, that, upon the death of the husband, the wife takes one-half of the community property as heir."

He mentions no decision of the court, but it needs no clairvoyance to apprehend that he has the Burdick case in mind. Notwithstanding the forthright and unambiguous declarations of the Civil Code of California, recognizing the joint ownership of husband and wife in the community property, Mr. Justice Temple goes on to say that the Civil Code—we would not be suspected of exaggeration, we quote his words—"gives to the husband complete legal ownership of the community property (Civ. Code, Sec. 172), and confers upon the wife no element of ownership whatever." And he adds, that "courts and counsel have occasionally endeavored to find some property right in the wife, or some respect in

which the husband's interest falls short of full property," and, strangely enough, refers to DeGodey v. DeGodey, 39 Cal. 157, and extracts from that case the language, inapt to his purpose, that the interest of the wife is "so vested in her that the husband cannot deprive her of it by his will, nor voluntarily alienate it for the mere purpose of divesting her of her claim to it." What "element of ownership," it is to be conjectured, would the learned judge find in "a minor under guardianship, whose ownership is complete, although his property is subject to control and alienation as the law provides, but who has, in general, no power in himself, either to manage or sell it, and will never have such power, unless he happens to live to the age at which the law admits him to that right" (Abbott, J., Reade v. DeLea, 95 Pac. 143). Mr. Justice Temple, be it said with respect, is in evident confusion "between the practical effect of the husband's power and its legal ground" (Arnett v. Reade, supra).

Mr. Justice Temple says, rightly enough, that "the testamentary power is not an essential incident to property, and depriving the husband of such power with reference to the community estate, did not take from him any right of property." Testamentary power, like the right of inheritance, as this court has said, is the creature of the law. But the law is not to be suspected of a mere brutum fulmen. If it accords, as it instructively did by the Act of 1850, to the heirs of the wife, a right of inheritance from her, by a descent cast upon them of her half of the community property, that is a tolerably

clear recognition of the existence of something, in the way of an estate, to be cast upon the heirs. If the wife, as in California since 1923, has, by legislative authority, the power, pre-deceasing her husband, to dispose by will of half the community property, that is a fairly persuasive indication that she had something of substance to will away.

Mr. Justice Temple goes upon the dictum of Van Maren v. Johnson, carried into Packard v. Arellanes, supra, and upon the doubtful and mistranslated passage from Febrero, which he quotes fragmentarily, and without any allusion to the interpretation put upon the entire passage by the Supreme Court in Fuller v. Ferguson, 26 Cal. 547, 569-570. He makes a passing reference to the "state of things in France under the code," as importing that the wife has a mere hope. The state of things under the French code would not seem to be decisive as to "the system of community estate" which, as Mr. Justice Temple himself had just remarked, "we derived from the Mexican law which prevailed here before the acquisition of the territory." At that. Mr. Justice Temple misconceived "the state of things in France under the code," as we have heretofore sought to point out (Garrozi v. Dastas, 204 U. S. 64, 78, 79, 79-80; DeNicols v. Curlier, 1900, Appeal Cases, H. of L., 21, 23, et seq.).

It is the irony of fate, in the light of the California legislation of 1917, that Mr. Justice Temple, after observing that the community property system, as well in California as in the other commu-

nity-property states, "was inherited from Spain or Mexico, and simply continued with such changes as were deemed desirable," should go on, in this same Spreckels opinion, to speak of "the state of things" in the community-property State of Washington, as follows:

"In Washington, the husband cannot convey real estate belonging to the community without joining the wife; there the husband and wife may at any time agree as to the status of the community property, such agreement to take effect at the death of either, and either may give, grant, or sell to the other his or her interest in community property. Naturally, in that State, it has been held that the wife has a vested interest in the community property."

In Sharp v. Loupe, 120 Cal. 89, 91, it was held that the Legislature could empower the husband "to authorize the executor to sell any portion of the community property without obtaining an order of court therefor;" and this, because "the right of inheritance, as well as the right of testamentary disposition, are entirely matters of statutory enactment, and the latter may be exercised to such an extent or with such limitations as the Legislature may prescribe." That the legislature, while subjecting the community property, in probate administration, to the payment of the debts of the husband, who, alone during coverture, as sole manager, could charge it with debts, did not empower him to dispose, by testamentary provision, of the wife's one half. Of the right of the surviving widow in the community property, it was said that it "is such as the statute has made it, and the same authority which declares the extent of her rights can also declare the time when, as well as the mode in which, they shall be ascertained and placed under her control." Incidentally, there is a reference to the Estate of Burdick as holding "that the interest of the surviving widow in the community property is that of an heir." But this was a bare, unreasoned statement. And in Cunha v. Hughes, 122 Cal. 111, it was held, as indeed Mr. Justice Harrison had explained in his opinion in the Burdick case, that the probate court, in the course of its liquidation, had jurisdiction to ascertain the charges against the community estate, determine the surplus, if any, and conclude the widow by its distribution made accordingly. And this, independently of any question of The remark made in Cunha v. Hughes, succession. citing Estate of Burdick, supra, that "the surviving widow took her share of the community property by succession from her husband," was obiter.

Estate of Moffitt, 153 Cal. 359, is the decision which the Legislature of California disapproved and repudiated in the State Inheritance Tax Law of 1917, referred to in Blum v. Wardell, supra. It refers to the dicta in Van Maren v. Johnson and Packard v. Arellanes, and makes the statement, quite unwarranted as we have been at pains to point out, that Mr. Justice Thornton was "speaking for the court" in Greiner v. Greiner, 58 Cal. 119, when he said that "the interest of the wife during coverture was a mere expectancy like the interest which an heir may possess in the property of his ancestor." The Moffitt opinion goes upon the Burdick case and

the Spreckels case as determining, "after painstaking investigation and review," that upon the death of the husband, "the wife takes one-half of the community property as heir." It declines any independent discussion, refers to the arguments contra as having been "fully met" in the opinion in those two cases, and dismisses the subject by remarking that "no useful purpose can be subserved by a repetition of these arguments or of the answers to them."

The Burdick and Spreckels cases, with their acquiescent follower, the Moffitt case, we venture to characterize, with very real deference, as the apocrypha of California jurisprudence. Mr. A. C. Freeman, the eminent and standard California law writer (Freeman on Judgments, Freeman on Co-Tenancy and Partition), Editor of the American Decisions, American Reports, and American State Reports, in his note to English v. Crenshaw, 127 Am. St. 1025, 1063, speaks of the Burdick and Spreckels cases:

"The California courts, some years ago, advanced the remarkable theory that a surviving wife takes her share of the community property as the heir of her husband: Matter of Burdick, 112 Cal. 387; Spreckels v. Spreckels, 116 Cal. 339; Sharp v. Loupe, 120 Cal. 89. From this erroneous notion, the logical conclusion has recently been drawn, that her share in the community is subject, on his death, to the inheritance tax: Estate of Moffitt, 153 Cal. 359. Supreme Court, in announcing this doctrine, seems not unaware of its gross injustice, and hence of its erroneousness, but attempts to place the responsibility therefor with the Legislature. Whether the courts or the Legislature be responsible, the error should certainly be corrected, for the law of community property, as thus interpreted, all but ignores the rights of the wife, and becomes a mere name, without substance."

The Legislature acted in 1917, in consistent recognition, as every legislative Act from the first bears witness, of the rights of the wife, by "repealing" the *Moffitt* case.

California Decisions, both before and after the "erroneous" triad of Burdick, Spreckels, and Moffitt, holding that the wife, so far from succeeding to her share of the community as an heir of the husband, takes it "in her own right," as the surviving member of the matrimonial partnership.

From Beard v. Knox, 5 Cal. 252, decided in 1855, to Johnson v. Bush, 49 Cal. 198, 17 decisions of the Supreme Court of California as has been seen, have proclaimed the "present, definite, certain interest" of the wife in the "common property" of which she and her husband were "jointly seized" during coverture: an interest "belonging to the matrimonial community, and not less to the wife than to the husband," and "as well defined and ascertained in contemplation of law, even during the marriage, as is that of the husband." Not "a mere name without substance," to borrow the language of Freemannominis umbra; but "one undivided half of the common property in her own right, by virtue of the community existing between herself and husband," to recall the words of Mr. Justice Field, by which he atoned in Payne v. Payne, 18 Cal. 292, 302, for the earlier and inadvertent expression of Van Maren v. Johnson.

Estate of Silvey, 42 Cal. 210, was decided in 1871. Estate of Rossi was decided in 1915, 169 Cal. 148. The interval is 44 years. We list the cases decided by the Supreme Court of California, at one upon the point, during this tract of time:

> Estate of Silvey (1871), 42 Cal. 210; King v. LaGrange (1875), 50 Cal. 328; Estate of Frey (1878), 52 Cal. 658; Estate of Gwin (1888), 77 Cal. 313; In re Gilmore (1889), 81 Cal. 240; Directors v. Abila (1895), 106 Cal. 362; In re Smith (1895), 108 Cal. 115; Estate of Wickersham (1902), 138 Cal. 355; Estate of Vogt (1908), 154 Cal. 508; Estate of Prager (1913), 166 Cal. 450; Estate of Rossi (1915), 169 Cal. 148.

It was in one of these cases, *Directors v. Abila*, 106 Cal. 362, that Mr. Justice McFarland, who had signed the opinion of Mr. Justice Temple in the *Burdick* case, was led to say:

"It (the wife's interest in the community property) has sometimes been defined," (referring to the *Van Maren* case) "as a mere expectancy, like the interest which an heir may possess in the property of his ancestor; although it is, *no doubt*, more tangible than the mere expectancy of a general heir."

All these cases, with one voice, characterize the wife's status in respect to her interest in the common property, not as that of an heir, but as that of the survivor of the matrimonial community. Ex

uno disce omnes. Take the Gilmore case, 81 Cal. 240, for an example.

"The testator," it is said, "must be presumed to have known the law applicable to the disposition of property by will, and, therefore, to have known that he had no power to dispose by will of his wife's interest in the community property, but only of his own interest therein."

And again, referring to the earlier cases of *King v. LaGrange*, 50 Cal. 332, and *Estate of Silvey*, 42 Cal. 212, it was said:

"A purpose to attempt the disposition by will of property which by statute would pass to the wife as survivor of the matrimonial community upon his death, is not to be readily inferred."

Or to take one of the latest, *Estate of Prager*, 166 Cal. 450, 453, decided long after the *Burdick*, *Spreckels* and *Moffitt* cases:

"In the absence of anything in the instrument to indicate a contrary intent, the testamentary disposition must accordingly be understood as intended to cover only the property which the testator had the right to devise or bequeath, i. e. his separate property, and an undivided half of the community property. The mere fact that provision, however liberal, is made in the will for the wife, is not enough to justify the conclusion that such provision was intended to be in lieu of her interest as survivor of the community."

And the court cites many of the cases we have listed, from *Beard v. Knox*, 5 Cal. 252, and *Morrison v. Bowman*, 29 Cal. 348, to *Estate of Vogt*, 154 Cal. 508.

## The Second Spreckels Case, 172 Cal. 775.

The first Spreckels case was concerned with a gift made by the father to his son Rudolph, of a portion of the community property. The gift, it may be recalled, was made in 1893, but the portion of the community property constituting the gift, was acquired by the spouses prior to the amendment of 1891 to Section 172 of the Civil Code, requiring the written consent of the wife to a gift of any portion of the community property. It is interesting to remark that, in the second Spreckels case, 172 Cal. 778, 781, the court limited the first case to the single point in judgment, that the husband's power of disposal had not been qualified retrospectively by the amendment of 1891. The first case, it is said in the second case, "held that the amendment of 1891 could not be construed retroactively, and applied to property previously acquired, so as to deprive the husband of the right theretofore vested in him to make a gift of that community property."

In the second case, it is pointed out, "a very considerable portion of the property involved was acquired after the year 1891, and therefore, of course, subject to the limitation in the proviso."

It will now be seen, on looking into the second case, that any expression therein as to the "expectancy" of the wife, was no less obiter dictum, than the statement to that effect in the first Spreckels case. Claus Spreckels, the husband and father, did make large gifts, during the marriage, to the two sons,

John D. Spreckels and Adolph B. Spreckels, of community property largely acquired after 1891. The wife, Anna C. Spreckels, did not consent in writing to these gifts. Claus Spreckels died first. His will made no provision for these two sons, "for the reason that I have already given to them a large part of my estate." Claus Spreckels died on December 26, 1908. Anna C. Spreckels died on February 15, 1910. Her will, like that of her husband, made no provision for these two sons, and for the reason expressed therein, "that my deceased husband, Claus Spreckels, prior to his death, had already given and advanced to my said sons a large part of his estate." Here was a plain recognition, ratification, and consent in writing by the wife, in respect to these gifts. That satisfied the amendment of 1891. The court so held in the second case. That was the point in judgment. Consideration of the precise status of the wife, in relation to the common property, was unnecessary and obiter.

But the court indulged in dicta, unguardedly and inaccurately. It was said to be "the established doctrine" that during the marriage the husband was the "sole and exclusive owner" of the community property—the wife "had no title thereto, nor estate or interest therein, other than a mere expectancy as heir if she survived him." Van Maren v. Johnson is cited, and the Greiner case, neither of which "established" such "doctrine:" the Burdick case, the first Spreckels case notwithstanding its limitation by the second case itself to the single

point of the husband's anterior power of disposal under a statute construed prospectively, and the *Moffitt* case are cited, also *Directors v. Abila*, supra, in which the court had declared, as a matter beyond doubting, that the wife's interest was more than a mere expectancy, "it is no doubt more tangible than the mere expectancy of a general heir." The cases cited at this point are said to be "in addition to the cases above cited." And "the cases above cited" are to the proposition thus stated:

"In consequence of the provision of Section 11 (of the Act of 1850), declaring that on the death of either husband or wife, one-half of the common property should go to the survivor, and the other half to the descendants of the deceased spouse, and, under the Mexican law of community property, it was further held that the husband could not, by his will, prevent her from *inheriting* one-half thereof upon his death."

The use of the term "inherited," in respect to the wife's half, upon the death of the husband, is inaccurate, unguarded, and misleading. For what are the cases "above cited"? Beard v. Knox, 5 Cal. 256, which nowhere "held" that the wife "inherited" her half from the husband. "The husband and wife," said that case, "during coverture are jointly seized of the property, with a half interest remaining over to the wife, subject only to the husband's disposal during their joint lives; this is a present, definite and certain interest, which becomes absolute at his death." And again, that the wife

could take, "with the greatest propriety," a legacy under her husband's will, without derogation from her half of the common property, because the legacy "was part of her husband's estate, and not her own." Scott v. Ward, 13 Cal. 469, and Payne v. Payne, 18 Cal. 301, are the next two cases "above cited," and in both, this language of Beard v. Knox is repeated and approved, and it is categorically stated that the wife "took one undivided half of the common property in her own right, by virtue of the community existing between herself and husband." Packard v. Arellanes, 17 Cal. 538, is the next citation, the case making the unfortunate statement that the descendants of the predeceased wife did not take from her by inheritance—subsequently rejected in the two decisions of Johnson v. Savings Union, 63 Cal. 560, 561, and 75 Cal. 134, 141. Next is cited Fuller v. Ferguson, 26 Cal. 565, which, as we have seen, stands unequivocally for the subsisting and vested interest of the wife. And finally, Lord v. Hough, 43 Cal. 581, which holds, prior to 1891, that the husband's power of disposal extends to a gift of common property, "reasonable in reference to the whole amount"-in that case \$4000 to the husband's mother, out of common preperty of \$100,000.

Again, the opinion in the second Spreckels case makes the statement that "if the husband undertook to dispose of all of the community property by will, giving the wife less than one-half thereof, such disposition was not absolutely void, but had the effect of putting her to her election whether to

take under the statute or under the will." At the least, it is to be said of this statement, that it is lacking in precision, and is ambiguous. Morrison v. Bowman, 29 Cal. 346, is cited, a leading case, which we have noticed at length, and which pronounces, in exact terms, the equal and vested interest of It holds that the wife is not put the wife. to an election at all, that she takes the testamentary provision over and above her half of the community property, because the husband can will away only what is his, not what is hers,-except that she must elect in the extreme case where the will expressly requires her to choose between its provision for her and her interest in the common property, or where the provisions of the will are such as to involve their own defeat and destruction, unless the surviving wife makes such choice. Estate of Stewart, 74 Cal. 98, and Estate of Smith, 108 Cal. 119, also cited, approve and follow Morrison v. Bowman; and Estate of Vogt, 154 Cal. 509, the last case cited under this head, affirms the ruling of the previous cases, and describes the status of the widow, in respect to her half of the common property, as that of "survivor of the matrimonial community."

But two decisions have been found, only two, says the opinion in the second *Spreckels* case, involving community property acquired after 1891, *Fulkerson v. Stiles*, 156 Cal. 704, and *Fanning v. Green*, same volume, 281. Of these two cases, it is said:

"In each of these cases, the doctrine above stated, that the wife has no interest or estate in community property during the marriage relation, and that the husband is the absolute owner thereof, subject to the limitation upon his power of disposition, is reiterated."

This comment, it must be said, is not warranted.

In Fulkerson, v. Stiles, the deed to some land, purchased with community funds, was taken in the name of the wife. Did the husband, in the circumstances, intend that the deed, so taken, should operate a gift of the land to the wife, making it her separate property?—that was the point. Both husband and wife testified "that there was no intention or purpose to make a gift to her, or to make the property her separate estate." The court made its findings accordingly. It was held that, "without such intention to make a gift, the mere conveyance to her would not invest it with that character." And for this, Fanning v. Green, the other case, at page 280 of the same volume, is cited. There is nothing in the Fulkerson case, either obiter or as a point in judgment, to justify the comment above noted. The same is to be said of Fanning v. Green, the character of which is sufficiently indicated by the point to which it was cited in the Fulkerson case.

The real point in the second *Spreckels* case, the turning point, was the consent of the surviving wife, manifested by the terms of her will. Of that will, the court said and held:

"It was equivalent to an express ratification and confirmation of said gifts, and it was a consent thereto by her in writing, advisedly made."

## Dargie v. Patterson, 176 Cal. 714.

This was an action brought by the surviving wife to set aside a gift of some land, community property, deeded by the husband to the defendant in the action. The wife had not consented to the gift. After the husband's death, she brought suit against the donee to avoid the deed. The court held that the deed was voidable to the extent of one-half,—to the extent of the wife's interest in the community property. As to the other half, the deed was held to be binding on the husband, his heirs and representatives, and to convey title to one-half to the grantee and donee.

The court inquires, "May the wife avoid the deed in its entirety, or only so far as is necessary to protect her rights?" In answering the question, the opinion refers to the husband as the owner of the community property, and, uno flatu, speaks of his power to dispose thereof "so far as concerns his own interest,"—at once implying the existence of a concurrent interest in another, none else but the wife. The apparent contradictio in adjecto is thus expressed:

"During his lifetime, the husband, notwithstanding the statutory limitation upon his power of disposition, is the owner of the community property. The proviso attached to section 172 does not impair his right to dispose of the property so far as concerns his own interest and that of those claiming under him."

The opinion, now, suggests, "why, then, should the widow's claim extend to any more than the one-

half which would pass to her as survivor of the community?" And it answers its own question—
"the privilege of avoiding the gift is conferred upon her as a means of protecting her interest in the community property."

The court, in the case before it, the husband being dead, found no necessity for determining whether the wife could bring suit to attack such a conveyance during the lifetime of her husband; and in that regard, it refers to such an action as "an action to protect her interest in the community property." "This question was mentioned," the opinion goes on, "but not decided, in the later Spreckels case; there is no occasion to decide it here."

It had been argued to the court that the amount of free community property, on the death of the husband, was more than enough to satisfy the wife's half, without disturbing the full effect of the deed of gift; and the language of Chief Justice Beatty, in his specially concurring opinion in the first Spreckels case, along those lines, is quoted in the opinion now under review. The opinion was "not disposed to adopt the suggested rule"; and this was the explanation made:

"The widow, upon showing the existence of the facts bringing a conveyance within the terms of the proviso of Section 172, is entitled, so far as her rights are concerned, to treat that conveyance as a nullity. She has the right to avoid the conveyance so far as it is necessary for the protection of her interest in the property conveyed. As to her, the case must be regarded as if there had been no conveyance, and

the property had accordingly remained a portion of the *community estate*, of which the husband had died seized ("jointly seized," *Beard v. Knox*, and other cases, which we have already discussed). Upon his death, she succeeded to one-half of such community estate as heir of of the husband."

This last sentence might well have been left out. It was not necessary to the decision, and with it out, the case, if we are to regard things rather than names, the thing signified rather than the sign, symbol, or label, is infused with a recognition of the substantive interest of the wife, co-equal with that of the husband, in the "community estate." Indeed, her right, called by whatever name, "goes," it is said, "to every part and parcel of the community estate,"—language in strange contrast with Mr. Justice Temple's dictum in the Burdick case, that "the wife has no right or title of any kind in any specific property, but a possible interest in whatever remains upon a dissolution of the community otherwise than upon her own death."

#### Estate of Brix, 181 Cal. 668.

Brix and his wife, after 20 years of married life, had accumulated much community property, real and personal. Their relations became strained. They made a settlement of property rights. Brix conveyed valuable real estate to his wife. The only consideration therefor was her waiver "of all her interest in the community property." The State Controller sought to visit the transfer with liability

for State Inheritance Tax, under the statute then applicable, as of a transfer made "without valuable and adequate consideration." Of course if the husband was the exclusive owner of the community property, if the wife had no interest therein of any kind, the transfer was without consideration, and upon that point, the State Controller turned his case.

The opinion of the court is a palmary instance of the inherent infirmity of the "expectancy" theory -of the triumph of things over mere names. court declines to apply to the situation before it, the theory that the wife has no more than a mere expectancy like that of an heir. "This rule," says the court, "is not determinative of the present case." It proceeds, not without some self-contradiction, to set forth various proprietary aspects of the wife's status, omitting, however, the basic thing insisted upon in DeGodey v. DeGodey, 39 Cal. 158, 164, that "the theory upon which the right of the wife is founded (as we said in Galland v. Galland, 38 Cal. 265), is, that the common property was acquired by the joint efforts of the husband and wife." We give the language of the Brix opinion:

"This rule (referring to the "expectancy theory") is not determinative of the present case. While the wife has no title to the community property nor estate or interest therein, yet she has rights in relation thereto, the surrender of which may constitute a valuable and, according to the circumstances of the case, an adequate consideration for the transfer. She has a 'possible interest in whatever remains

upon the dissolution of the community otherwise than by her own death' (taking this language from the Burdick case, but not adverting to the contrasting language of Dargie v. Patterson, supra, that her right, by whatever name, "goes to every part and parcel of the community estate"). Upon the death of the husband she takes one-half of the community property, and upon a divorce she may, in a proper case, be awarded even the whole of it. (Citing Civil Code, Sections 146, 1402.) If a divorce is granted without any disposition of the community property, the former wife becomes the owner of one-half of the community property as tenant in common with her former husband. (Here, DeGodey v. DeGodey, supra, is cited, and two later cases following it). the husband makes a gift of community property without the wife's consent she may, upon his death, recover from the donee one-half of the property so given. (Citing Section 172, Civil Code, and Dargie v. Patterson, supra.) The fact that she may thus attack a conveyance by the husband, made without her consent, on the ground that it was a gift, has a practical application that renders it a great disadvantage to a husband not in cordial relations with his wife. (The transfer in question, we interpolate, was made in 1913-before the amendment of 1917, by which a deed of community estate, though for valuable consideration, is required to bear the signatures of both husband and wife.) It has become the universal custom with purchasers of real estate to insist on her signature to all contracts relating thereto. The custom is so general that it is a matter of common knowledge, of which the court may take judicial notice. In the actual dealings of the husband in community real estate, this gives her a practical control or power of interference, which may be a great burden to him. Where a husband and wife are not in accord, but live in strained relations, as was the case here, the adjustment of their relationship as to property, so that this power of the wife to control, object, or interfere is taken away, may be a consideration of very great pecuniary value to the husband, and fully adequate for a transfer of valuable real estate."

#### Schneider v. Schneider, 183 Cal. 335 (July 26, 1920).

Sarah Schneider sued Jacob Schneider for divorce. She alleged cruelty, prayed for a dissolution of the matrimonial bonds (contracted or attempted to be contracted in 1908), and sought a division of the community property. The woman had "married" Schneider in good faith; but it turned out that her former marriage had not been legally dissolved. During the years of her union with Schneider, certain property, "accumulated by their joint efforts," had been acquired. The trial court, in view of the woman's former and undissolved marriage, was constrained to deny a divorce in respect to the second and putative marriage, but it decided, equitably, that the joint property should be treated by analogy to community property, and divided it equally between the parties. Schneider was sordid enough to appeal.

The Supreme Court thus stated the question before it:

"Under the authorities, it is clear that a void marriage confers no rights upon either of the parties to it in respect to the property of the other, such as would be conferred by a valid marriage; but in the case before us, the question for determination is: Conceding that the marriage was void, what right, if any, has the plaintiff in the property acquired by the joint efforts of herself and the defendant, during their cohabitation entered upon innocently upon the faith of their admittedly void marriage?"

We have called attention, heretofore, to the rule of the Spanish-Mexican law, so creditable to the Spanish sense of justice, whereby the right of the putative wife, acting in good faith, to one-half the ganancials, is put upon a parity with that of the legitimate conjugal partner. The Supreme Court of California remarks that in Louisiana and New Mexico, "the property rights of the woman" referring to the putative wife, "are recognized and protected by statute." In four of the seven community-property states, the property rights of the woman are recognized, it is said, and protected by judicial decision. The State of Texas is particularly referred to, as a forum in which the question "has been given attentive consideration." And Texas, it is further said, reflects the Spanish law. The Supreme Court of California plants its decision on the case of Morgan v. Morgan, 1 Tex. Civ. App. 315, and quotes and adopts its language as follows:

"The status of property acquired by a man and woman living together as husband and wife, without having been lawfully married, has been the subject of doubt and litigation almost from the time Texas became an independent republic. It will thus be seen (after reviewing the early cases) that the strong tendency of our judges in the past, has been to hold that property, acquired in this State under our community laws by a man and woman living together as husband

and wife, should belong to them in equal shares, whether they were legally married or not. And why should this not be so, especially when they have attempted to enter into a marriage contract, and believed that they were lawfully husband and wife? In such cases, by attempting to enter into the marriage contract, they agreed, as far as they had the power to agree, that they would live together as husband and wife, and that all property that they might thereafter acquire, should be community property, and belong to them in equal portions. Such is the meaning of the contract they attempted to make under our law. How, then, can it be said that the property acquired in pursuance of such a contract shall belong to one of the parties more than to the other? What right has the husband to all of the property to the exclusion of the wife, or what right has the wife to all of the property to the exclusion of the husband? Suppose a wife so situated should, by her own exertions, acquire property toward which the husband did not contribute anything, would it be contended that this property became his prop-How, then, can it be, that where the property is acquired by the joint labors of both. each in the eye of the law contributing one-half thereto, it shall belong only to the husband? It will not do to refer to the decisions in commonlaw states to sustain the proposition that the woman, under such circumstances has no right to any part of the property so acquired. those states, by entering into the marriage contract, she understood that all the property they might acquire, while living together, should belong to the husband, but in this State, she understood that their rights in the property they might accumulate, should be equal."

This exposition of the equal rights of husband and wife in the common property "acquired by the joint labors of both, each in the eye of the law contributing one-half thereto," had the cordial agreement of the Supreme Court of California, in July, 1920, in the Schneider case.

"In California," said the court, "as in Texas, the common law is the general rule of decision, but in both states the law regulating the mutual property rights of married persons is radically different from that law; and while we do not wish to be understood as saving that the rules of the common law as to husband and wife apply to no case under our system, yet we agree with the Texas courts, that the common law rule, as to the consequences of a void marriage upon the mutual property rights of the parties to it, is inapplicable where the community property regime prevails. This conclusion is dictated by simple justice, for where persons domiciled in such a jurisdiction, believing themselves to be lawfully married to each other, acquire property as the result of their joint efforts, they have impliedly adopted, as is said in the Texas case cited, the rule of an equal division of their acquisitions; and the expectation of such a division should not be defeated in the case of innocent persons,"

# Roberts v. Wehmeyer, 191 Cal. 601; Taylor v. Taylor, 192 Cal. 71.

These two cases are antithetical. The earlier one, the *Roberts* case, goes upon the expectancy theory; the later case, *Taylor v. Taylor*, turns on the vested right of the wife.

In the Roberts case, the property in question, some land in Monterey County, California, "was paid for out of community funds, substantially all of which had been accumulated before July 26, 1917," the effective date of the amendments of 1917, to the Civil Code. Roberts and his wife acquired the land about a month later. "On August 21, 1917, they purchased certain described land in Monterey County, the deed being taken in the name of William A. Roberts alone." The conversion of community funds, acquired prior to 1917, into realty, at this later date, was, in the view of the court, inessential, a mere change of form, and the case was treated as one involving property which came into the community before the legislation of 1917. For this reason, the court expressly declined to pass on the effect of the legislation of 1917, and limited its decision to a consideration of the law, as if the statutes of 1917 had never existed.

On January 24, 1920, Mrs. Roberts brought suit for divorce. The California statute, Civil Code, Section 131, calls for two steps to be taken before a marriage is dissolved: first, a provisional, or, as it is termed, an "interlocutory" decree, simply "declaring that the party in whose favor the court decides, is entitled to a divorce;" second, a "final judgment granting the divorce," entered on motion of either party, or on the court's own motion, "when one year has expired after the entry of such interlocutory judgment." During this probationary year, the marriage status remains undissolved (Estate of Dargie, 162 Cal. 51; Brown v. Brown, 170 Cal. 3).

Mrs. Roberts got her interlocutory decree on February 20, 1920. Prior thereto, however, and indeed

on the day before she filed her suit, Roberts had made a deed to the defendant Wehmeyer of the land in question, which was recorded January 29, 1920. Mrs. Roberts did not join in this deed. The consideration therefor was Wehmeyer's promissory note, payable in one year. He knew that Roberts and the plaintiff were husband and wife. It is needless to speculate on the circumstances of the transaction, for the case was disposed of on a finding that Wehmeyer acted without any fraud.

While the divorce proceeding was still in the interlocutory stage, without any final judgment, Mrs. Roberts brought the suit in hand against Wehmeyer, not joining her husband, "to have the title to the property declared to be in plaintiff, on the ground that a conveyance of community property by a husband is void under Section 172a of the Civil Code (the amendment of 1917), unless his wife joins in its execution." It is at once apparent that the wife was asking for the entire property, on the foot of a mere interlocutory decree, pending which the marriage was undissolved, and the husband's power of disposal-if the amendment of 1917 was not to apply -was still operative to transfer community real estate effectively to a bona fide purchaser for a valuable consideration. So far forth, that would be the only question-the husband's power of disposal. And the court, in concluding its opinion, puts forward as an independent and decisive consideration, "that no title could have vested in respondent (the lower court had adjudged the entire property to her) by virtue of the interlocutory decree of divorce"; and "that the community property may be divided only upon a dissolution of the marriage, and that an interlocutory decree is not such a dissolution." Whatever else the opinion may have said, touching the ownership of the community property, in distinction from the husband's power of disposal, was dictum.

The sad confusion arising out of the ascription, at times, of heirship to the wife's interest in the common property, in contradiction of her true status as "survivor of the community," "entitled of right" to one-half of the property "by virtue of its community character," had been strikingly, if not painfully, illustrated in the Estate of Dargie, 179 Cal. 418, 420. The testator Dargie, treating, for the purposes of his will, all his property as community property, did, by the will, "confirm unto my said wife, Erminia Peralta Dargie, one-half of all the property, real, personal, or mixed, of which I may die seized or possessed, being the same portion thereof to which she would be entitled in the event of all of my said property being community property." Construing the will, Mr. Justice Wilbur took occasion to say:

"During the lifetime of the husband, he is the owner (co-owner and manager?) and entitled to the possession of all the community property. Upon his death, the surviving wife becomes entitled to one-half of the community property as the survivor of the marital community, regardless of the existence of other heirs or of a will, but the other half passes by will, or, in case of intestacy, by the laws of succession, to his heirs—including the surviving wife in certain cases (this would be where he left no blood kinsman within given degrees, Civil Code, Sec. 1386). One-half, then, is the portion of the community property to which the widow is entitled by virtue of its community character. That the testator was referring to this half of the property to which she is entitled of right, is also further indicated by the use of the word 'confirm'."

It is here said that the surviving wife is entitled to one-half as community property, as the survivor of the marital community, "regardless of the existence of other heirs." But it is a confusion, a misconception, to group her with "other heirs," when, "regardless" of them, she is entitled, not as heir, but "as survivor of the marital community." "She is entitled of right," says Mr. Justice Wilbur, —is an heir entitled of right, indefeasibly, to property of the ancestor, despite the disposition made by the ancestor in other directions? The wife, in the words of Mr. Justice Wilbur, is "entitled of right," and is so entitled, in respect to her half, "by virtue of its community character." And Mr. Justice Sloss, in his concurring opinion, declares that "the gift to the widow of 'half of my estate,' in the absence of words indicating a contrary intent, would carry to her one-half of the estate subject to testamentary disposition; and she would take, in addition, one-half of the community property as survivor": citing the cases to which we have made extensive reference, in which "the present, definite, certain interest" of the wife in the common property of which she and her husband are "jointly seized during coverture" is so clearly announced and proceeded upon—Beard v. Knox, 5 Cal. 252; Estate of Silvey, 42 Cal. 210; Estate of Smith, 108 Cal. 115; Estate of Vogt, 154 Cal. 508; Estate of Prager, 166 Cal. 450.

Now, then, it was this confusion of thought, or ambiguity of expression, exemplified by Mr. Justice Wilbur, which was imported by Mr. Justice Lawlor into his dicta in Roberts v. Wehmeyer. He refers to the Burdick case, supra, in which the heirship of the wife and the heirship of the husband had netted Mr. Justice Temple in the toils of verbal logic; to the second Spreckels case, where the heirship of the wife was not the point in judgment at all; and to the early dictum of Van Maren v. Johnson. He does admit, however, that "a wife's rights in such property (the common property) have been held to constitute a valuable consideration for an agreement or transfer," citing Estate of Brix, 181 Cal. 667, and that "on the dissolution of the community by divorce, the wife's half of the community property immediately vests in her as tenant in common with her husband," citing DeGodey v. DeGodey, 39 Cal. 158. With the exception of a passing mention of the first Spreckels case, this exhausts his consideration of the California decisions, save for the erroneous statement that Beard v. Knox, 5 Cal. 252, and other cases like it, had been "disapproved," citing the Moffitt case, supra,—notwithstanding, to say no more, the approved citation of Beard v. Knox, and other such cases, in Estate of Dargie, 179 Cal. 418, to which we have just pointed.

Mr. Justice Lawlor makes a reference to the old case of Guice v. Lawrence, and some succeeding cases, from Louisiana. We have heretofore referred to the Louisiana cases, and to the opinion of the Attorney General, in which the law of that State, its statutes and decisions, are explained, and to the recent and comprehensive decision in Liebman v. Fontenot, 275 Fed. 689. Indeed, these very citations of Mr. Justice Lawlor from Louisiana, say in terms that "the child of the marriage inherits the share in the community of the deceased parent, subject to the usufructuary right of the surviving parent." It is not easy to grasp, as Mr. Justice Abbott pointed out in Reade v. DeLea, supra, how the child could take from the predeaceasing mother, as her heir, something as to which the mother herself had nothing but the expectancy of an heir from an ancestor, a husband, who survived her. The confusion of ownership with power of disposal, sometimes breaking out in detached expressions in some few cases in Louisiana, will not avail, as it did not avail in Arnett v. Reade, supra, to impeach the co-ownership of the wife.

Mr. Justice Lawlor's reference to the other community property states, including a statement that the cases there "undoubtedly have held that the wife has an estate during coverture," may be left to what has been said by us heretofore, to what was said by this court in Warburton v. White, supra, as to the essence and origin of the community property system, and to the brief, previously noted, in the pending case, filed by Mr. Allen G. Wright, amicus curiae, for the San Francisco Chamber of Commerce.

Mr. Justice Lawlor is again, and strangely, confused in respect to Blum v. Wardell, supra. After a reference to the mistranslated passage from Febrero, without adverting to what was said of that passage in Fuller v. Ferguson, 26 Cal. pp. 569-570, and in Reade v. DeLea, supra, and in Arnett v. Reade, supra, he makes this statement in respect to Blum v. Wardell:

"We agree," he says, "with the decision of the Circuit Court of Appeals, in so far as it is based on an interpretation of the Inheritance Tax Act of 1917, to the effect that the part of the community property passing to the wife, should not be subject to such tax."

But Blum v. Wardell, speaking of the provision in the Inheritance Tax Act of 1917, recognizing the status of the wife as that, not of heir, but of a purchaser for valuable consideration, had said:

"That, in our opinion, settles the question here presented against the contention of the government, for we not only see nothing in the above-quoted provision of the United States Statute to indicate any intention to impose a federal inheritance tax upon the wife's half of community property which the statute of the State where the property is situate, expressly declares, passes to the wife upon the death of her husband, in her own right, and not as his heir, but the federal statute, as will be seen, expressly declares, as one of the essential conditions to the imposition of a federal inheritance tax, that the net estate of the decedent shall be subject to distribution as part of his estate."

The Circuit Court of Appeals, in *Blum v. Wardell*, was dealing, as the court here is dealing, with a federal statute, and it went on to say:

"It must not be forgotten that the sole question here is one of federal inheritance tax, and, even if the case was not controlled by the California statute of 1917, above referred to,—applying to it the rule of law announced by the Supreme Court of the United States in the ease of Arnett v. Reade, 220 U. S. 311, 320, the result, it seems to us, must be the same. The court there said: 'It is very plain that the wife has a greater interest than the mere possibility of an expectant heir'."

How could Mr. Justice Lawlor, with his notion of "expectancy," agree with Blum v. Wardell, "in so far as it is based on an interpretation of the Inheritance Tax Act of 1917?" Blum v. Wardell dealt with a federal tax, imposed by a federal statute. The Inheritance Tax Act of 1917 was a State statute; it related, and could only relate, to a State tax. If the State statute, making the wife a purchaser instead of an heir, in respect to the collection of State Inheritance Taxes, leaves her, as

to all things else, in the nebulous expectancy to which Mr. Justice Lawlor would assign her, how, then, could she escape the federal estate tax, creature of another statute and another jurisdiction,how could Mr. Justice Lawlor agree, so far forth, with Blum v. Wardell? The wife, except as to the State statute, would remain a mere expectant heir, deriving her interest only by transmission through the estate of her deceased husband, and taxable, therefore, like any other heir, upon that transfer. If the Circuit Court of Appeals and Mr. Justice Lawlor were of one mind as to any aspect of the federal case, how could such a thing be, when the Circuit Court of Appeals decided that the government's position, as to the wife's expectancy, was untenable?

Now, it will be remembered, that in Blum v. Wardell, the government came to this court for a certiorari. The application for the writ was denied on March 6, 1922. On March 20th, the government, in an application to revoke the order denying certiorari, advised this court that the case of Roberts v. Wehmeyer was on its way to the Supreme Court of California, and that the question of "expectancy" would be brought before the Supreme Court of the State. This motion to revoke remained here, unacted on, awaiting, it may be assumed, the action of the State court in Roberts v. Wehmeyer. When Mr. Justice Lawlor's decision came down, with its internal difficulties, and was read by the Solicitor General, he withdrew his petition to revoke the

order denying certiorari, using this language:

"This reasoning seems to us to sustain the existing construction of the California law, which, as we think, sustains the federal tax."

The Solicitor General's statement is, at least, plausible. If, under the law of California, except as to a state tax, the wife had a mere expectancy,if the husband, as the dicta of Mr. Justice Lawlor would make him, is the sole and exclusive owner, then the federal tax should have been sustained: for whatever, ad hoc, was transferred to her, came to her from and through the estate of her husband. sole and exclusive owner of the community property. How, then, could Mr. Justice Lawlor, with his figment of expectancy, come to the conclusion that the Circuit Court of Appeals correctly decided Blum v. Wardell. "in so far as it is based on an interpretation of the Inheritance Tax Act of 1917"? How could he, or anyone else, entertaining this notion of expectancy, feel clear about such a conclusion. Indeed, the Solicitor General goes on to say to this court:

"But its conclusion is not as clear as we could have desired. For this reason, the United States does not feel justified in pressing, in the instant case, its unusual motion that the court re-consider its previous action in denying our application for a certiorari."

### Taylor v. Taylor, 192 Cal. 73

In the Taylor case, the husband obtained a Nevada divorce from the wife. His complaint con-

tained the allegation that there was no community property. The wife was induced by him to file an answer in the Nevada Court, admitting that there was no community property. He procured her to do this, by paying her \$500 on a contract and settlement in San Francisco. The decree, however of the Nevada Court, was silent on the subject of community property.

After the marriage had been thus dissolved, the former wife learned that the husband had concealed from her the ownership of certain real property in San Francisco, community property it was, transferred, at his instance, from the grantor into the name of his own brother. Indeed he had deliberately represented to her that there was no community property whatever. Thereupon, she brought suit against him to quiet and confirm her title to half the San Francisco land, as a tenant in common with him.

The Supreme Court held, in the first place, following Brown v. Brown, 170 Cal. 1, that the Nevada judgment, itself silent on the community property, had been entered on pleadings alleging and admitting that there was no such property; and that a judgment, proceeding on such pleadings, was tantamount to a contract by the parties, available against the wife as an estoppel. This contract estoppel, however, it was further held, was overcome by the fraud of the husband, which had entered into the very basis of the asserted estoppel.

This brought the case down to a judgment of divorce, in which no disposition had been made by the court, of the community property. The wife argued, on the authority of DeGodey v. DeGodey, 39 Cal. 158, that she had a pre-existing vested right which, in the language of the DeGodey case, "accrued to her, as having been acquired in part by her own efforts, before the decree of divorce was rendered." Or, as was said in Macchi v. LaRocca, 54 Cal. App. 98, 100 (August 26, 1921), "her interest in the community property would vest by reason of her services as a wife, and without contribution of any part of the actual purchase price of the property." The Supreme Court states the position of the wife:

"Her position is, that no disposition of the community property was brought about in the divorce action, and that the parties became and have remained tenants in common therein. If that be true, and appellant be not estopped, their respective rights may be enforced in an independent action."

This position, the court sustains, and cites the DeGodey case, supra, two later California cases following it, and Ambrose v. Moore, 46 Wash. 463; also, Estate of Brix, supra, itself, in this point of view, resting upon and citing DeGodey v. DeGodey. Ambrose v. Moore was written by Judge Rudkin, when he was a Justice of the Supreme Court of the State of Washington. His language to the point, read and approved, as it must have been, by the Su-

preme Court of California in the Taylor case, was as follows:

"Where no disposition of the property rights of the parties is made by the divorce court, the separate property of the husband prior to the divorce, becomes his individual property after the divorce; the separate property of the wife becomes her individual property; and from the necessities of the case, their joint or community property must become common property. After the divorce, there is no community, and, in the nature of things, there can be no community property. The divorce does not vest or divest title, the title does not remain in abeyance, and it must vest in the former owners of the property as tenants in common."

He cites *DeGodey v. DeGodey*, supra, and *Biggi v. Biggi*, 98 Cal. 35; and from the latter case, also cited in the *Taylor* case, he makes the excerpt:

"The conveyance of the land to the husband and wife made it presumptively community property, and their subsequent divorce, without any disposition of that property in the decree, left them tenants in common."

The community property, it was said in *DeGodey* v. *DeGodey*, "accrued to her, as having been acquired in part by her own efforts, before the decree of divorce was rendered; that decree, as rendered, did not deprive her of it."

Deprivation—to be deprived—implies an anterior quantity, something that has already accrued to the party, and which, afterwards, is taken from the party. "The divorce does not vest or divest title." "A divorce," as this court said in Maynard v. Hill,

125 U. S. 190, 215-216, "ends all rights not previously vested. Interests which might vest in time, upon a continuance of the marriage relation, were gone."

Attorney General Stone, in his opinion of October 9, 1924, speaking of *Roberts v. Wehmeyer*, and *Taylor v. Taylor*, "leaves it to others to reconcile the decisions in these cases," and thinks that "if confusion existed before, so far as the California decisions are concerned, it is now the more confounded."

#### Estate of Jolly, 238 Pac. 353, August 27, 1925.

This is the latest decision of the Supreme Court of California. In this case, the Supreme Court, in an opinion concurred in by every member of the court, vigorously applies to the case before it, the presumption that property in the hands of the spouses, or either of them, is community property, and that the burden of overcoming the presumption is upon the party asserting separate ownership. The court explains and justifies the presumption, by reference to the "dominating rule" and "basic conception of the community property system." We quote this latest pronouncement of the court:

"The rule *dominating* the situation before us, is *well stated* by the text in 31 Corpus Juris 47, as follows:

"Since the very basic conception of the community property system is, that it is a species of partnership between a husband and wife, whereby they are to share equally in the benefit and enjoyment of the result of their joint or

separate industry, labor, and earning capacity; and accordingly, separate property is defined in terms necessarily making it an exception to the usual estate held by the members of the community,—every inquiry as to whether particular property belongs to the community, or to the separate estate of one or the other member thereof, begins with a prima facie presumption that it belongs to the former, especially where the matrimonial union has continued for a considerable length of time. The burden of overcoming the general presumption in favor of the community, is upon the party asserting separate ownership."

The text, thus quoted and approved, is supported by its references to the authorities from the various community property states, some of which have been cited and quoted in this brief—all maintaining, in firm and unconfused terms, the vested estate of the wife as an equal partner in the matrimonial community. The language quoted here is true to the Spanish-Mexican origin of the community system; it responds to the Constitution of 1849, to the plain provisions of the California statutes, to the forthright language of the codes, section upon section,—to every deliverance of the Legislature since California became a state, and to the preponderating decisions of the courts, from Beard v. Knox, in 1855, to Estate of Jolly, in 1925.

## IV.

#### ATTITUDE OF A FEDERAL COURT IN THE CIRCUMSTANCES.

We are dealing here with a federal statute. It concerns, not California alone, but all the commu-

nity property states, and calls for uniform application. As this court said, in speaking of the federal mining laws:

"The statute construed is a federal one, being a law not only for Colorado but for all the mining states, and, therefore, a rule for all, not a rule for one, must be declared."

### And again:

"At any rate, a federal statute has more than a local application, and until construed by this court, cannot be said to have an established meaning."

Calhoun Gold Mining Co. v. Ajax Gold Mining Co., 182 U. S. 499, 505.

In construing and applying a federal statute, laying a tax, this court will look to the fact of the matter; not to the mere name which a state court, at one time or another, may have given to the thing.

"Conceding the doctrine that the meaning of a statute is a state question, except where rights, the subject of adjudication by the federal courts, have accrued before its construction by the state court, or the question of contract within the protection of the federal constitution is involved,—still a state court, while entitled to great consideration, cannot conclusively decide that to be a tax within the meaning of a federal law, providing for the payment of taxes, which is not so in fact."

### And further:

"The state court may construe a statute and define its meaning, but whether its construction creates a tax within the meaning of a federal statute, giving a preference to taxes, is a federal question, of ultimate decision in this court."

New Jersey v. Anderson, 203 U. S. 483, 491-2.

"Neither state courts nor legislature by giving a tax a particular name, or by the use of some form of words, can take away our duty to consider its real nature and effect."

Choctaw & Gulf R. R. v. Harrison, 235 U. S. 292, 298.

The jurisdiction of the federal court, in the instant case, is attracted by the federal statute involved. The federal jurisdiction, however, may be invoked, to determine a mere local question, or to construe and apply a state statute,—this, where the accident of diversity of citizenship intervenes. But, in that event, the federal court is not an inferior jurisdicton. It has "an independent jurisdiction in the administration of state laws, coordinate with, and not subordinate to, that of the state courts." It is "bound to exercise its own judgment as to the meaning and effect of those laws" (Burgess v. Seligman, 107 U.S. 20, 33). It would be an obvious dictate of expediency, good will, and comity, in the exercise of a federal jurisdiction arising out of simple diversity of citizenship, to follow the decisions of the state court, settling the law of the state in the premises; "this is especially true with regard to the law of real estate, and the construction of state constitutions and statutes" (Burgess v. Seligman, supra). If anything may be deemed settled by the Supreme Court of California, in the law of community property, it is to be found in its latest decision as in its first, separated by an interval of 70 years,—that the community system rests dominatingly and basically on a matrimonial partnership, to the assets of which the wife conclusively contributes on an equality with her husband, and in which, from the moment of the marriage, she has a "present, defined, certain interest," as co-owner and co-partner. If this has not been "settled," if the decisions in California, even after the Estate of Jolly, supra, can still be said to be in confusion and conflict, that unhappy situation would be the irreducible minimum. It is the most that could be claimed. "But where the law has not been thus settled, it is the right and duty of the federal courts to exercise their own judgment" (Burgess v. Seligman, supra). The most recent expression of this court is from Mr. Justice Stone, writing the opinion in Hines v. Martin (October term, 1924, No. 363; May 25, 1925):

"When questions affected by the interpretation of a state statute, or a local rule of property, arise in a federal court, that court has the same authority and duty to decide them as it has to decide any other questions which arise in a cause; and where state decisions are in conflict, or do not clearly establish what the local law is, the federal court may exercise an independent judgment, and determine the law of the case."

The federal court has determined the law of this case. Warburton v. White, supra, determined it;

Arnett v. Reade, supra, determined it; Blum v. Wardell, supra, determined it.

#### CONCLUSION.

It is hoped that the length of this argument may be atoned for, in measure, by the method of presentation. The aim has been to give the brief a kind of completeness, within its own pages, to spare the physical labor, if nothing else, of laying it to one side for the necessity of procuring, opening, and reading this book or that—verifying this or that historical reference, this or that statute or decision. The Spanish-Mexican law and history give the perspective in which the California constitution and statutes are to be surveyed, and the decisions of the courts are to be appraised. The matrimonial partnership, it is believed, emerges as the consummate result.

The voluntary partnership, so familiar in every-day life, pays income tax on the just principle that taxation is correlated with ownership. One partner pays the tax on the share of the income which belongs to him, not on the share which belongs to his copartner. If it be said that the husband, the managing partner, pays the tax of his co-partner out of community funds, the discrimination is not redressed. The tax upon partnership income is not computed upon the aggregated revenue, with reference to the higher sur-tax bracket, and the larger exaction; it

is computed, for each partner, upon his share. It would be so computed in the case of a brother and sister, succeeding to the undivided ownership of an income-bearing property; it is so computed by the Treasury, it has been so computed by the Treasury for a period of years, in respect to seven out of eight community-property states. (Solicitor's Opinion, 121; T. B., 31-21-1845; Appendix, p. 360). Congress, in two general revisions of the Revenue Law, refused to alter the method of computation; once, at large, as to the community-property states, as well one as the other; again, in the specific case of California. But the discrimination against California still persists, though the highest law officer of the Government has advised to the contrary. We are asking this court to remove the discrimination.

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#### Addendum.

We have just received the government's brief. A short addendum—or corrigendum—would seem to be all that is required.

It may be said at once, speaking generally, that the argument of the government, from first to last, suffers from the "confusion between the practical effect of the husband's power, and its legal ground" (Arnett v. Reade, 220 U. S. 311, 320). It misses the essential conception of the community system, that is to say, that the control was given to the husband "not because he was the exclusive owner, but because by law he was created the agent of the community" (Warburton v. White, 176 U. S. 484, 494).

The status of the husband as the proper party plaintiff in actions respecting the community property, is only an aspect of his control and management, and is so treated in all the community property states; and such was the Spanish and Mexican law as we have pointed out in our brief.

The California statutes of 1917, throwing added protection and safeguards around the wife's interest, are not to be excluded from consideration by the assumption that the community property involved in this case was all acquired prior to 1917. In the first place, a substantial part of the community property involved in this case was derived from the salaries and services of the late Mr. Robbins

for the year 1918. But, in the next place, the statutes of 1917, as was said in *Blum v. Wardell*, are a legislative recognition of the pre-existing vested interest of the wife, and a determined effort on the part of the legislature to protect that interest. She was protected against fraud already; she was protected against fraud already; she was protected against gifts made without her consent; she had been protected against her husband's profligacy and derelictions ever since *Galland v. Galland*, 38 Cal. 265; the positive law of California, the statutes of its legislature from the beginning, had consistently recognized her as a co-owner. As this court said in *Arnett v. Reade*, supra,

"We can conceive no reason why the legislation could not make that protection more effectual by requiring her concurrence in her husband's deed of the land."

The legislation of 1917 did "make that protection more effectual".

The government's brief "proposes, first, to refer to the California statutes". But "without the cold courtesy of a passing glance" it leaves out Section 161 of the Civil Code, providing in terms that "A husband and wife may hold property as joint tenants, tenants in common, or as community property"; and similarly leaves out Section 682 of the same code, providing:

"Ownership of several persons. The ownership of property by several persons is either:

1. Of joint interest;

- 2. Of partnership interest;
- Of interests in common: 3
- Of community interest of husband and wife."

Some remarks of Professor Pomerov, in an article, many years ago, in a law magazine published at that time, written in evident haste, and obviously influenced by the "expectancy" dictum of Van Maren v. Johnson (supra), are referred to in the government's brief. The Professor does better in his Equity Jurisprudence (4th ed.) Vol. 1, Section 79, where he says:

"A number of the western and southwestern states have substantially adopted the French L (the Professor, with deference, should have said Spanish) system of community of assets, whereby the two spouses are co-owners of the community property, which is under the husband's exclusive management during their joint lives."

And, again, at Section 503 of the same volume, the Professor says:

"The husband's power extends only to onehalf of the community property, and he cannot by will devise or bequeath it in any manner or to any person so as to infringe upon the wife's vested right to one-half."

The government's brief tenders an "illuminating", if not "deadly", comparison between the law of Minnesota, a common-law state, and the law of California and the other community property states.

Griswold v. McGee, 102 Minn. 114, 125, and Stitt v. Smith, 102 Minn. 253, 255, are the latest Minnesota cases cited. They both go upon Randall v. Krieger, 23 Wall. 137, in which it was held that the wife's right of dower was purely contingent, and might, at any time before the death of the husband, be taken away by the legislature. "We should require", this court said in Arnett v. Reade, supra,

"more than a reference to Randall v. Krieger, 23 Wall, 137, as to the power of the legislature over an inchoate right of dower, to make us believe that a law could put an end to her interest (referring to her community interest) without compensation, consistently with the constitution of the United States".

Reference is made to an article by Professor Mc-Murray, of the California Law School, and particularly to a statement by the Professor that Beard v. Knox, supra, and other cases of like tenor, have been abandoned for the expectancy theory, said by the Professor to be according to the great weight of authority. And for this, singularly enough, the Professor cites Scott v. Ward, 13 Cal. 458, in which Beard v. Knox, so far from being abandoned, is reaffirmed, and quoted in terms, to the proposition that "the husband and wife, during coverture, are jointly seized of the property", and, again, referring to the wife's interest, that "this is a present, definite and certain interest, which becomes absolute at his death". The Professor also quotes the Warner

case, from an intermediate court, to the point that the husband, upon the death of the wife, does not take the property by succession, following this with the statement that the interest of the surviving wife is that of an heir,—for which he cites Estate of Burdick, supra, fully noticed in our brief, in which Mr. Justice Temple held that the husband succeeded to half of the community property as the heir of his deceased wife. We have commented in the brief on the toils of this verbal logic in which Mr. Justice Temple seems to have been caught. Indeed, in Section 26 of his Article, Professor McMurray says:

"The decisions are not always clearly reconcilable with the *extreme* view that the wife has no interest in the community property during the marriage."

The government's brief quotes a statement from McKay in his work on Community Property, in which McKay appears to say that "according to the Spanish law community property is such as the spouses share on a dissolution of the marriage, not such as they own together during marriage". This statement of McKay, as our brief redundantly shows, is a gross error.

Section 167 of the Civil Code of California provides that:

"The property of the community is not liable for the *contracts* of the wife, made after marriage, unless secured by a pledge or mortgage thereof executed by the husband." The government's brief makes the peculiar suggestion that under this state statute touching the contracts of the wife, a federal statute, imposing in invitum a tax on the wife's vested interest, would not be enforcible.

We quote the following from page 60 of the government's brief:

"District Judge Rudkin, in his opinion in the district court, discussing the California statutes and decisions, reached the conclusion that, prior to the enactment of certain amendments (meaning the amendments of 1917) to the California statutes on the subject, the wife had no estate. legal or equitable, in the community property during the life of the husband, saying (270 Fed. at p. 312): 'From these decisions, it becomes at once apparent that, prior to the enactment of the legislation upon which the plaintiffs rely. the wife had no estate, legal or equitable, in the community property during the life of the husband, that her interest was a mere expectancy, and that she took as heir to her husband, and not otherwise'."

What are "these" decisions that Judge Rudkin is speaking of? It would naturally be supposed, from the way it is put in the government's brief, that Judge Rudkin is speaking of the general run of California decisions prior to the statutes of 1917, attributing to them a unanimity without the shadow of confusion or conflict, in respect to the mere expectancy of the wife. But the government's brief leaves out the next following sentence of Judge Rudkin's opinion, and we now give that sentence:

"The plaintiffs earnestly insist that many decisions of the Supreme Court of California, both early and late, are entirely inconsistent with the view that the interest of the wife in the community property is a mere expectancy, like the interest of an heir in the property of his ancestor. This much I think must be conceded. As said by the Supreme Court of the United States in Arnett v. Reade, 220 U. S. 311, 320: 'However this may be, it is very plain that the wife has a greater interest than the mere possibility of an expectant heir, for it is conceded by the court below, and everywhere we believe, that in one way or another she has a remedy for an alienation made in fraud of her by her husband'. The same concession has repeatedly been made by the Supreme Court of California, but any attempt to review the many more or less conflicting community property decisions of that court. extending over a period of 70 years, would be futile."

(Since we have referred to the *Estate of Jolly* as the latest expression of the Supreme Court of California, it may be proper to notice that the two cases cited at pages 44 and 45 of the government's brief are decisions of the inferior and intermediate California court.)



# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1925

No. 493

Office Supreme Court, U. S. F I L E D

NOV 30 1925

WM. R. STANSBURY

THE UNITED STATES OF AMERICA,

Plaintiff in Error,

VS.

REUEL D. ROBBINS, Jr., and Sadie M. Robbins, as Executors of the Last Will and Testament of R. D. Robbins, etc.,

Defendants in Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF CALIFORNIA.

# Volume II.

## **APPENDIX**

to

# BRIEF FOR DEFENDANTS IN ERROR.

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#### APPENDIX I.

# THE CIVIL LAW

OF

# SPAIN AND MEXICO.

ARRANGED ON THE PRINCIPLES OF THE MODERN CODES, WITH NOTES AND REFERENCES.

PRECEDED BY

A Historical Introduction to the Spanish and Mexican Law;

AND EMBODYING IN AN APPENDIX SOME OF THE MOST IMPORTANT

# ACTS OF THE MEXICAN CONGRESS.

By GUSTAVUS SCHMIDT,

COUNSELLOR AT LAW

"Materiem ex titulo cognosces, caetera liber explicabit." Plin. Jr. 5 Ep. 13.

NEW ORLEANS: PRINTED FOR THE AUTHOR BY THOMAS REA.

1851.

Entered according to the Act of Congress, in the year 1851, by GUSTAVUS SCHMIDT, in the Office of the Clerk of the District Court of the United States in and for the Eastern District of Louisiana. TO

# CHRISTIAN ROSELIUS, ESQ.,

PROFESSOR OF CIVIL LAW,

IN THE

# UNIVERSITY OF LOUISIANA.

THIS WORK IS RESPECTFULLY DEDICATED.

BY HIS FRIEND,

THE AUTHOR.

#### PREFACE.

THE following work was originally undertaken with a view to enable the author to acquire a competent knowledge of the laws of Spain, which once governed Louisiana, and which still form the basis of a large portion of its jurisprudence.

He has been induced to make it public by the encouragement afforded him by many distinguished lawyers of Texas and Louisiana.

The recent acquisition of California and New Mexico will probably render the work at present of some practical utility to the legal profession; and the author also entertains the hope that it may be of some use even to men of business having dealings with the republics of South America.

He will not attempt to palliate the errors, no doubt numerous, which the work contains, but he will faithfully promise, that should a second edition be required, he shall not fail to correct all such as he may be able to discover.

NEW ORLEANS, June 16th, 1851.

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# HISTORICAL OUTLINE OF THE LAWS OF SPAIN.

"Les lois sont toujours le monument le plus important et le plus instructif pour l'histoire."—Thiers.

# [1] INTRODUCTION.

The history of mankind, philosophically considered, is a magnificent drama, in which nations, after centuries of preparation, are by turns called upon to play their part. Its commencement, it is true, eludes our research, and its final termination lies hid in the inscrutable future; because it began in the infancy of time, and will end, when its Allwise author may think proper to bring it to a conclusion. So exquisite, however, is the skill of its various parts, that human sagacity can, without any extraordinary effort, trace their harmonious design, although the great unities, which guide the whole, are but dimly discerned.

The sphere of modern history has been greatly enlarged, and its utility much increased, by the discovery, that the moral universe is regulated by laws, as constant in their operations as those of the material uni- [ii] verse. It is, no doubt, true, that these moral laws are affected by innumerable disturbing causes, the effects of which can rarely be

fully appreciated; yet, the principle itself, like that of gravitation, furnishes a guide which has already been productive of the most useful results.

The historian of the present day pursues his vocation in a loftier spirit, and with a more comprehensive aim than those which guided his predecessors. The physical, intellectual, moral and religious progress of mankind, considered as one family, although subdivided into innumerable groups, forms the object of his researches.

This has unavoidably directed his attention to many inquiries hitherto neglected, and forced him to take a general view of human pursuits, instead of limiting his investigations to the mere rise and fall of empires, and the lives of those who have played some prominent part in the revolutions which change the fate of nations.

History, therefore, as now understood, in investigating the development of man, and the progress of humanity, presents, at the same time, a clear view of all the different gradations by which he has attained his actual position. It inquires how he has discharged his relations to his creator, to himself, to society and to the material universe; because he must be viewed in all these aspects, in order fully to appreciate his actual development.

That the task of the historian, when pursued in this spirit, has become exceedingly difficult, and that it requires the highest intellectual qualities and attainments, [iii] will readily be conceded. This difficulty is moreover increased by the immense labor required to collect suitable materials for such a history in the actual state of the literature of the world.

In explaining the individual and social condition of man at any given period, you must have an accurate idea of the highest point of development which he has yet attained, as well as the lowest whence he departed. But this presupposes, at least, a general acquaintance with the whole circle of human knowledge. That such knowledge is attainable, cannot be doubted, but not until the special history of every art and science has been written by the ablest masters in each. The historian need not be a practical merchant, manufacturer nor agriculturist, nor a practical engineer, physician or jurist; and yet, without a competent knowledge of each of these pursuits, he will not be an able historian.

In the actual condition of the literature of most countries, it may safely be affirmed, that accurate special histories of the subjects above enumerated, as well as of many other auxiliary acquirements indispensable to the formation of a good history, are not to be found.

Let us take the history of jurisprudence as an example, and where, I ask, among the civilized nations of the world, is one to be found which can exhibit, not a complete, but a tolerably exact, history of the rise, progress, and actual condition of its laws.

On the European continent, France, whatever may be thought of her position in other sciences, occupies avowedly the first rank in the science of the law. Still, even France does not yet, notwithstanding the ac- [iv] knowledged ability and indefatigable industry of her jurists, possess an accurate history of her laws. Some of her ablest legal writers, and *Troplong* among the number, who has labored assiduously to supply, to a certain extent, this want, both by example and precept, admit this fact.<sup>1</sup>

Even Germany, with all the laborious and scrupulous research which characterize the productions of her learned jurists, cannot exhibit a faithful history of the formation of her laws.

England has never produced any thing which can fairly aspire to the rank of a history of her juris-prudence, although the works of Hale, Reeves and Crabb, which bear this title, contain some valuable materials, which may be of service to the future historian of her laws.

It would, perhaps, not be unreasonable to infer, that a task, which neither England, Germany, nor France has as yet accomplished, has not been effected elsewhere. Such inferences, how plausible soever they appear, are not always conformable to experience; because in the pursuit of science, as in many other pursuits, neither nations, nor individuals, follow the same path.

<sup>1.</sup> See the different introductions to the works of Troplong on Sale, Mortgages, Prescription, &c. and his Essays in the "Revue de Legislation." "L'Histoire du Droit Francais est a faire," says Mr. Klimrath in his excellent Essay on the "Importance scientifique et sociale d'une histoire du Droit Francais," "Revue des Revues de Droit." Vol. 1, p. 194. See also, "De l'histoire et de la philosophie dans l'étude des lois civiles." par Gustave Bressolles, Ibid. Vol. 5, p. 335.

Still we believe the fact incontestable, although efforts have certainly been made by other nations to [v] supply this want. Thus Russia, for example, after labors continued for nearly a century and a half, has, at last, a digest of its laws, in the composition of which, the rise and progress of its legislation has been carefully investigated from the time of Peter the Great, and even during some portions of an earlier period. Sweden has also, by the publication of the ancient provincial laws of that kingdom, prepared useful materials for the future historian of its laws, and many other nations have of late directed their inquiries in the same channel.

Indeed, the fact is no longer disputed, nor even susceptible of dispute, that the historian, who neglects to examine the rise and progress of the jurisprudence of the country whose annals he is recounting, neglects one of the most important and accurate sources of information; without the aid of which he must fail in his attempt of faithfully transmitting its history.

If we examine the historical productions of modern times, of Amedée and Augustin Thierry, of Guizot and Michelet, for example, in France; of Gibbon, Dunham, &c., in England; of Niebuhr, Aschbach, Lembke, &c. in Germany; of Prescott, &c., at home, we cannot fail to perceive that the marked superiority of their historical labors of er those of their predecessors, arises, in a great degree, from the aid they have derived from their researches into

the rise and progress of the laws and the institutions of the country they were examining.

It is hardly an exaggeration to say, that the history of the laws of a country is, in many respects, a complete history of the country itself, as is maintained by [vi] a French writer.¹ This opinion seems also to have been entertained by the celebrated Edmund Burke, when he declared, that all the labors of Parliament resulted in little else than in bringing twelve men into the jury-box.

But if a knowledge of the history of jurisprudence be of such importance to the professed historian, its relative importance is still greater to the professional jurist. Called upon, by the nature of his pursuits, to vindicate the rights of his fellow-citizens against the innumerable aggressions and wrongs which form the subject of litigation, a thorough knowledge of the history of the law is the only safe guide through the labyrinth of legal enactments and interpretations from the examination of which he is to form his opinions. The maxim of Montesquieu, "Il faut eclairer l'histoire par les lois, et les lois par l'histoire."2 cannot be too carefully adhered to by the lawyer; since, if he has failed to follow it he will never deserve the title of a jurist.

<sup>1.</sup> Granier de Cassagnac, in his Introduction to his "Histoire du Droit Français." See "Du Droit comme base de l'histoire." "Revue des Revues des Droit." Vol. 1, p. 86.

<sup>2.</sup> Esprit des Lois. B. 31. chap. 2, in fine.

It can hardly be doubted, that much of the confusion, diversity of interpretation, and the antinomies, which exist in the legislation of most countries, arise from the want of a sufficient acquaintance on the part of judges and legislators, with the history of the law. Nay, jurisprudence hardly deserves the rank of a science, until such a history has been written, exhibiting the rights of persons and of property among different [vii] nations, and in different ages. In every other science, such a history exists; and the student is thereby enabled to ascertain, with some degree of certainty, the progress of the science, and its actual condition at a given period. In the legal science alone, no general history of its rise and progress is to be found, although a nobler, or more useful enterprise, than the composition of such a history cannot easily be conceived. Such an undertaking would, no doubt, require the genius and learning of a Montesquieu or a Savigny; but the very existence of such men, and the nature of their juridical labors prove the possibility of such a performance, which, in our age, has been greatly facilitated by the immense materials every where collected in aid of the reform of the law.

In the absence of such a general history of the law, each jurisconsult will have to make himself familiar with the history of the rise and progress of the law of the country whose jurisprudence he desires to understand. The presumed existence of a desire to acquire such a knowledge, has prompted the author in the composition of the present outline of the History of the Laws of Spain, which is necessarily both brief and imperfect; but which, by directing the reader to the sources whence more ample information may be obtained, will enable him to supply its deficiencies.

#### CHAPTER I.

# RISE AND PROGRESS OF THE LAW OF SPAIN.

## Division of the Subject.

A satisfactory history of the laws of Spain does not exist, although various very creditable efforts have been made to supply the deficiency. Among these, the labors of *Marina* and *Sempere* are the most comprehensive and accurate; and they have, accordingly, been diligently consulted.

Few countries have experienced so many vicissitudes as Spain; and few, if any, present more varied and more instructive lessons in the social sciences. Governed successively by the Iberians, the Celts, and the Phenicians, the ancient history of Spain, though obscured by time and disfigured by fables, affords sufficient information to enable us to ascertain that it was at a very early period a rich and flourishing kingdom. Conquered at different periods by the Carthaginians, the Romans, the Vandals, Suevi and Alani, the Visigoths and the Arabs, Spain, in spite of the admixture of so many different races, and the frequent and radical changes of its government, has preserved a distinctive character, the principal features of which seem to have adhered to it from remotest antiquity.

[10] In tracing the history of the jurisprudence of Spain, we have, however, to deal rather with her institutions than with the national character of the inhabitants; and it will not therefore be expected that we should attempt to develop the latter, except so far as it may be requisite to illustrate our subject.

The modern history of Spain presents four epochs, so distinctly marked as not to escape the most superficial observer. By an almost unavoidable coincidence it so happens, that these periods correspond to the great changes in the laws of the country; and they afford, consequently, convenient and natural subdivisions in considering the rise and progress of its jurisprudence.

Hence, the subject will be examined under the following four heads, viz:

- 1. Spain under the Romans.
- 2. Spain under the Visigoths.
- 3. Spain under the Arabs, and
- 4. Spain after the Expulsion of the Arabs.

These different epochs, although so distinctly marked as not to be mistaken, cannot, when applied to the jurisprudence of the country, be circumscribed by any accurately defined limits. Each exercised a powerful influence on the legislation of the period; but laws are so intimately interwoven with the habits, customs, manners and pursuits of a nation, that their effects are felt, and they continue practically to exercise some influence, even after they have been superseded. Thus, the Roman law

will be found to have prevailed in Spain long after the promulgation of the laws of the Visigoths; and the latter retained their influence under [11] the Arabs, and finally coalesced to some extent with the Roman law. Upon the system thus formed were engrafted portions of the canon and of the feudal laws, and out of these elements, variously modified by the municipal institutions of the country, arose the actual jurisprudence of Spain.

The development of this system of jurisprudence differs in many important particulars from that of England and America. What has not inaptly been called "judicial legislation" is unknown in Spain. No tribunal exists there whose decisions are considered as authoritative precedents; and hence reports of adjudications, so useful and so conclusive, where the common law of England prevails, are sought for in vain. The different codes of the kingdom, often enriched by the commentaries of learned jurists, relying chiefly on the doctrines of the Roman law, are the sole authorities ever quoted in courts of justice; and where these prove insufficient, or doubts arise as to the proper interpretation of the law, the subject is referred to the monarch.1 This mode of administering justice has some advantages and many inconveniences, and it is, no doubt, one of the reasons why Spain is so rich in codes. and has so few treatises on detached portions of the law.

<sup>1.</sup> Fuero Juzgo, l. 11, T. 1, B. 2.

If we examine the elementary writers on Spanish law, Sala and Asso y Manuel for example, we find them invariably relying on the codes, with here and there a reference to the Roman law in pari materia. A system of this kind has certainly the advantage of [12] stability; but it is deficient in expansiveness and adaptation to the growing and ever varying wants of a large and active community. Another inconvenience results from the difficulty, not to say impossibility, of providing by positive legislation for all controversies which may possibly arise; and the danger, that in attempting to do this, the codes become too voluminous and complex. This has been verified in Spain, whose legal writers from the reign of Ferdinand and Isabella up to the present time have complained of the obscurity and confusion prevailing in its laws. Nay, this complaint has emanated even from the throne, by which the body of the law is declared to be difficult and obscure in its application, from the want of order, connexity and unity in the mass of the legal system, &c.1

The latest author of the General History of Spain remarks,<sup>2</sup> "That the political history of Spain during the middle ages is to be found, as it were, abridged and symbolized in her codes. The Fuero Juzgo, being the oldest, represents the theocratical

<sup>1.</sup> El cuerpo actual de derecho es de dificil y obscura aplicacion por falta de orden, de conexion y unidad en la masa del systema legal," &c., Royal Decree of the 26th April, 1829, appointing a commission to form a criminal code.

<sup>2.</sup> Modesto de Lafuente, "Historia General de Espana, Discurso pre liminar," p. 107 Maurid, 1850.

monarchy, established by the Goths, and which may be regarded as the connecting link between the ancient society, which perished, and the new society which arose on its ruins.

"The Fueros Municipales are the democratic char-[13] ters of Spain, and an emblem of the franchises acquired by a people recovering liberty at the expense of great efforts and sacrifices. In the Fuero Viejo de Castilla are to be found the seigneurial privileges of the Castillian Nobility, and the legal sanction of their rights. The Partidas mark the period of transition, when the monarchy, re-organizing itself, borrows from the Roman and canon laws their monarchical traditions, admitting the municipal privileges only as forced allies, and the prerogatives of the nobles as an indispensable compromise. By the introduction of the Partidas, the clergy recovered their immunities, and Rome obtained for the first time the legal sanction for the principle of supremacy, which she had been unable for many centuries to establish in Spain."

These observations, certainly exact, exhibit in a clear manner some of the distinctive characteristics of a few of the codes of Spain; but they are insufficient to enable us to judge either of the origin of these codes, their contents, or the circumstances which gave rise to their adoption. This deficiency we shall endeavor to supply in the sequel, and now proceed to consider:—

#### CHAPTER II.

#### FIRST PERIOD.

Spain under the Romans.

The Spanish peninsula, prior to the conquest of the Romans, was, with the exception of the coasts, fre- [14] quented by the Phenicians, the Greeks, and the Carthaginians, inhabited by numerous independent tribes. Strabo enumerates thirty such tribes on the river Tagus alone; and he describes them as very rude and savage. War, fishing and hunting appear to have been their principal occupations. Agriculture seems to have been unknown. The inhabitants of the lowlands paid some attention to the raising of cattle, while those of the mountains lived on acorns during a great portion of the year.

Their intercourse with the Romans, by teaching them the arts of civilized life, gradually softened their manners, and accustomed them to a more commodious and tranquil life. The inhabitants of Bætica, (Andalusia) in particular, profited early by the instructions of the Romans, and were soon able to rival their teachers in literature, and even vie with the inmates of the eternal city itself in the appropriate use of the latin language.

<sup>1. &</sup>quot;De situ orbis." B. 3.

<sup>2. &</sup>quot;Diodor. Sicul." "De fabulosis antiquorum gestis." B. 6.

From the conquest of Spain by the Romans, its history is so blended with that of the Roman Empire, of which it became a province, that it does not require any separate attention.

Subdivided into districts, governed by Legates, Proconsuls, or Presidents, appointed at first by the Senate, and afterwards by the Emperors, it became subject to the Roman law.

Rome, as is well known, was governed as a municipality, and this form of government it gradually extended to the provinces, under the lex Julia municipa [15] lis, so to the form of the Roman Empire a species of confederation of cities. Indeed, modern Europe has inherited its municipal organizations from Rome. Each of these corporations regulated its internal affairs by officers of their own selection, and though subordinate to the government of Rome, they enjoyed a certain degree of freedom highly favorable to their prosperity.

While Rome continued a republic there existed a marked difference between the inhabitants of the provinces and those of Rome. The former were divided into *Coloni, Municipii,* &c., but these distinctions were gradually abolished during the emperors and all the inhabitants of the Empire were placed on an equal footing.

<sup>1.</sup> Revue de Legisi, for 1845, Vol. 1, p. 353.

<sup>2.</sup> Guizot, Histoire Moderne, Vol. 6, 2e leçon, p. 14. "Le Regime municipal, voila ce qu'a legué á l'Europe moderne l'ancienne civilization romaine."

Every city had its Curia, Decuriones, Duumvirs, Ediles, and other officers who exercised functions similar to those of the Senate, Consuls, Prætors, &c., at Rome. The possession of wealth was a requisite condition to obtain these offices at Rome as well as in the provinces.<sup>3</sup>

Every city possessed property and rents intended for its support, and administered separately from those of the State. They consisted chiefly of lands, woods and houses, and of dues imposed on objects of consumption, &c.

Each city had a public register, on which was in-[16] scribed the names, and the property of its inhabitants, and the contributions for which each was liable. The officers having charge of these registers were called *censitores*, or *tabularii*.

The *Duumvirs* and other officers were elected by the *Curia*.<sup>1</sup>

The *Decuriones* were all noble and enjoyed numerous privileges.<sup>2</sup>

Although the municipal government was chiefly entrusted to the patricians, the plebians were entitled to participate in many public acts, and were eligible to many important offices. They might be chosen *Defensores* of the Cities, an office invested with considerable authority, among which was the duty of protecting the people against the injustice of the magistrates, the insolence of the subaltern officers,

Cod. l. 2, "De decurion. et filis eorum."
 Dig. l. 5, Same title.

<sup>3.</sup> Gravina. "De ortu et progressu juris civilis." chap. 3.

and the rapacity of the money-lenders; they had also the duty assigned them of denouncing malefactors and provoking their punishment.<sup>3</sup> The defensor was elected by the whole people, and he could neither be a *Decurion* nor a military man.<sup>4</sup>

In the provinces, the people held general meetings for the purpose of deliberating on their common interests, and represent their grievance to the Emperors, long after the *Comitia* had been abolished at Rome.<sup>5</sup>

These assemblies must not be confounded with the Conventus juridicus, and still less with the Cortes, or [17] great assemblies of Spain, held during the middle ages.

The Conventus juridicus was a court of sessions held by the president of the province, assisted by a certain number of councillors and assessors, at fixed periods, to hear and determine suits, and to provide for the civil administration of the province. Spain had fourteen courts of this description, viz: Cadiz, Cordoba, Ecija and Sevilla, in the province of Batica; Carthagena, Tarragona, Zaragoza, Clunia, Astorga, Lugo and Braga, in Tarraconensis; Merida, Bejar and Santarem, in Lusitania.

Augustus divided Spain into three provinces, called *Tarraconensis*, *Lusitania* and *Bætica*, instead of the prior division into citerior and ulterior Spain.

<sup>3.</sup> Cod. 1. 2 & 4, "De defensoribus civitatum."

Ib. l. 2, 8.
 Cod. Theod. l. 1, 3. "De legatis et decretis legationum."
 Plin, Hist. Natur. B. 3, cap. 1.

Besides the foregoing assemblies, the artisans had also their colleges or associations, in which they met to deliberate on questions connected with their occupations, and to regulate their interests.<sup>2</sup>

While a shadow of republicanism prevailed in the municipal governments, the cities continued to prosper in spite of a constantly increasing taxation, and the notorious corruption of the imperial court.

Spain was never more populous nor more distinguished for its industry, than during the first centuries of the empire. The traces of this period still remain, and are to be seen in the bridges, roads, aqueducts, [18] temples, amphitheatres, baths, &c. which are yet to be found in the peninsula. Some of the cities of Spain were so celebrated during this period, that many of the most distinguished citizens of Rome, and even foreign kings, did not disdain to act as their Duumvirs. Marcus Antonius, Caligula, Germanicus, and Drusus, held these offices in Carthagena and Zaragoza, and Juba, King of Mauritania, occupied the same office at Cadiz.

Spain also produced many distinguished men during this auspicious period some, of which, like

<sup>2.</sup> Heineccius seems to think that this privilege was exclusively granted to the artisans of Rome. "De collegiis et corporibus opificum;" but that this is not accurate may be inferred from "Codex Theodosianus." l. 2. "De excusationibus artificum."

<sup>1.</sup> Masdeu, "Hist. Critica de Espana." Vol. 8, § 21.

<sup>2.</sup> Avienus, "Ora maritima." Vers. 282.

Nerva, Trajan, Adrian and Theodosius, were invested with, and did honor to, the imperial purple.

But the Roman Empire was fast hastening to decay. Its organization, inadequate to control the numerous nations subject to its sway, even when best administered, became wholly insufficient for that purpose, when the direction of its affairs fell into feeble hands; and from the moment corruption began to sap what yet remained valuable in its institutions, its fate was sealed. Rome had fulfilled her destiny, and on her ruins other societies and other empires were about to arise. But the transition was gradual, and the setting sun of the ancient mistress of the world still lingered above the horizon, imparting before it finally disappeared, many a genial ray of heat and light, destined to warm and fructify the institutions of her successors.

The causes of the decline and fall of the Roman Empire, though often told, are probably not yet fully understood, from the difficulty of tracing the hidden [19] currents which probably contributed, even more affectually than those to be seen on the surface, in undermining its foundations.

For the present purpose, it is sufficient to know that the oppression at first felt at Rome, by degrees extended to the provinces, where, by excessive and iniquitous taxation, it destroyed industry, generated corruption, and finally converted a brave, intelligent and laborious race of men into idlers and paupers.

In the meantime, some few individuals, profitting by the calamities attendant on misrule, like vultures on a battle-field, enriched themselves at the expense of the mass of the people, and acquired immense wealth.

The riches thus acquired were partially invested in extending the landed possessions of its owners, which were readily abandoned by oppressed husbandmen, who, when the greater portion of the fruits of their labors went to support their corrupt rulers, had no longer any motive for exertion. The estates, acquired by these means, were often of vast extent and the largest portion was left without cultivation from the impossibility of obtaining laborers to till the soil. These possessions, known by the name of latifundia, contributed to the final ruin both of Italy and Spain.

In short, Spain, after having profitted largely by the prosperity of Rome, was involved in all the disasters attending on its decline and final destruction.

To trace the law of Spain, while it remained a Roman province, would require an analysis of the Her- [20] moginian, Gregorian and Theodosian Codes, as well as of the Pandects and Codes of Justinian, a task which will neither be required nor attempted. All that is necessary to say is, that the

<sup>1.</sup> Latifundia perdidere Italiam, jam vero provincias," says the elder Pliny. See also, Jovellanos, "Informe sobre la ley Agraria," in his complete works, Madrid, 1845, Vol. 1, p. 28.

jurisprudence of Spain, during this period, was that of Rome, which has been illustrated by thousand commentators, and which has, especially in modern times, been exhibited in a great variety of forms by writers of distinguished ability, well known to every jurist.

Amidst the ruins of a crumbling empire, it would be vain to expect that the law should retain its original purity, or prove adequate to the protection of the life and property of the citizen. Salvianus, Amianus, Marcellinus, and other contemporary writers, have imparted to us some knowledge of this period, which was one of desolation and most frightful corruption. In an age, when every thing was venal, the administration of justice did not escape the general contamination, and was bought and sold like every thing else. Some efforts were, no doubt, occasionally made to check an abuse so grievous in its nature, but always in vain.<sup>1</sup>

The time to put an end to so much iniquity had therefore arrived; and the invasion and destruction of the Roman Empire was more owing to the effeminacy and vices of the subdued, than the acknowledged bravery and power of the invaders. For, when misrule and oppression have reduced a nation to apathy and dispair, every change is considered an improvement, and effectual resistance to invasion is not to be expected.

<sup>1.</sup> Libanus, "Oratione adversus ingredients in magistratuum domus," quoted by Sempere in his "Histoiria del Derecho Espanol," p. 34.

#### CHAPTER III.

#### SECOND PERIOD.

Spain under the Visigoths.

"Fourteen centuries of revolutions and changes of every kind, so common to the government of this peninsula," says Sempere, "have not yet entirely extinguished the spirit, which the founders of the Gothic monarchy imparted to its inhabitants. Many of the usages and customs introduced by these barbarians are still preserved." &c.

These facts, which are indisputable, render it necessary to examine this period with more care than the preceding, not only because it is less known, but because it has exercised an influence on the laws of Spain, which endures to the present time.

Whence the Visigoths came is a problem which has engaged the serious attention of many a learned head, but which will not detain us for a moment. Their history is written in their deeds, and with their swords they have inscribed in letters of blood on the annals of the world their character and purpose.

Tacitus has sketched in his usual masterly manner the manners of the ancient Germans; although it remains still doubtful whether his work on this

<sup>1.</sup> Hist. del Derecho Espanol, p. 35.

subject was not intended rather as a satire on the effeminacy and corruption of his own countrymen, than as a faith- [22] ful delineation of a people of which his knowledge must necessarily have been very imperfect.

That the Goths were a rude but brave people when they first came in contact with the Romans. does not admit of a doubt; although the exact epoch of that event is not accurately determined. are said to have aided Pompey during the civil wars; and it is known that during the reign of Constantine, they ravaged Greece, whence they were expelled and driven beyond the Danube by Still, they were ever hovering that emperor.1 around the Roman Empire, on which they often committed depredations, and by which they were frequently employed as useful allies. In consequence of internal dissensions, they divided into two parties under Fridigern and Athanaric, as leaders; the latter of whom joined Valens, aided him in obtaining the empire, and embraced his religion. which was that of Arianism. Athanaric shortly afterwards quarrelled with Valens, fought, defeated and burnt him alive in a village where he had taken refuge.2

Under the reign of the second Theodosius they again appear as allies of the Romans, and in the reign of his son, Honorius, they demanded lands to settle in addition to their stipends, threatening, in

<sup>1.</sup> St. Isidorus, "Historia Gothorum," apud Sempere, p. 40.

<sup>2.</sup> Ibid.

the event of refusal, to take forcible possession of some Roman province. In this perplexity, the emperor, by the advice of his council, abandoned to them Southern Gaul and Spain, which, having been invaded by the *Vandals, Alani* and *Suevi*, were already considered lost. The [23] Goths accepted the offer, and speedily departed to take possession of their new domain.

Stilicon, a Vandal by birth, was at this time the prime minister and favorite of *Honorius*. This man, whose virtues and exploits have inspired the muse of *Claudianus*, is said to have given his master the treacherous advice to destroy the Goths, and thus rid himself at one blow of dangerous allies and formidable enemies.

It was favorably received, and Stilicon, in the execution of it, fell upon the Goths suddenly while entangled in the passes of the Alps; but even with this disadvantage, Gothic valor triumphed over Roman treachery, and Stilicon was ignominiously defeated. Alaric, the leader of the Goths, justly incensed at this perfidy, returned to Italy, attacked, took and plundered Rome. Honorius, to appease the conquerors, did not hesitate to sacrifice Stilicon; and to secure still further the union between the Goths and Romans, he gave his sister, Placidia, in marriage to Athaulf, the successor of Alaric.

<sup>1.</sup> Such is the account of Sempere, p. 40, 41, but I have in vain sought confirmation of this statement, for which he gives no authority in the historians of the time. See Zozine, B. 5, p. 408, who says that Stilicon fell a victim to the intrigues of Olympius, and was murdered in a church at Ravenna.

This Athaulf is generally considered as the first Visigothic king of Spain, although he can hardly be said to have acquired a permanent footing in that country. He was assassinated while advancing on Barcelona in the year 415.

Wallia succeeded him, and conquered Tarraconen-[24] sis and Bætica for the Romans; for which service he and his Goths received Aquitaine in Southern Gaul, where they established their capital at Toulouse.

Theodoric succeeded Wallia, and aided the Romans in defeating Atilla and his Huns at Chalons, where he fell. (451.)

Thorismund became his successor, and on his death, (452)

Theodoric 2d. ascended the throne. He was assassinated by his brother Euric. (467.)

This *Euric*, who reigned from 467 to 484, is one of the most remarkable men of this stormy period, alike distinguished for great virtues and the most revolting crimes. The throne, acquired by fraticide, he preserved by his valor, and he extended his sway over the whole of Spain and a large portion of Gaul, where he established his seat of government at *Arles*. A zealous Arian, he filled the episcopal sees of his dominion with these sectarians, in spite of the murmurs of his Roman subjects, who were all catholics.

He was the first to reduce the laws of the Visigoths, previously preserved only by tradition, to writing; and the Code of Euric is said to have fur-

nished his successors many a text, afterwards incorporated into the Fuero Juzgo.1

This primitive code, probably one of the earliest composed by the Germanic nations, is no longer in existence, and little is known of its contents. It is said to [25] have been intended exclusively for the government of the Goths, the legislation of the period being altogether personal, that is, each nation being governed by its own peculiar laws.1

This legislation of Euric does not appear to have given much satisfaction, and his son and successor, Alaric II, promulgated another code, known as the "Breviarium Alaricanum," or "Breviarium Anniani," a title given to it in the 16th century, prior to which period it was known as the Lex Romana, or Lex Theodosii.

This code, the compilation of which has been attributed to Annianus2 and Goiarie,3 contains, according to Savigny.

<sup>1.</sup> Isidorus, "Historia Gothorum, p. 35. "Sub hoc rege Gothi legum statuta in scripta habere caperunt. Nam antea tantum moribus et consuetudine tenebantur.

Zarate asserts that these laws were known as Leges Teodoricianas from the name of Theodoric, which was that of Euric, prior to his ascending the throne, when he assumed the name of Euric or Evaric, which in the language of the Goths means eminent legislator. "Analysis de la Legislacion Espagnola." Vol. 1, p. 12. Savigny, on the contrary, after showing that the existence of the Leges Theodoricianas depends on the interpretation of the 2d Epistle of Sidonius Apollinarius, where it is used in opposition to Leges Theodosianas, regards it as designating the Gothic laws generally, without reference to any particular code, and he rejects the opinion of Canciani, that it was intended to designate a code formed previous to the Breviarium of Alaric, as unfounded. "Geschichte des Römischen Rechts im Mittelalter." Vol. 2, p. 68, Note C.

<sup>2.</sup> Asso y Manuel, Instituciones &c. Vol. 1, p. 2. Sala, "Derecho Real," Introductoin, p. vi.
3. Marina, "Ensayo Historico Critico." Vol. 1, p. 2, Note 2.

- 1. Sixteen books of the Theodosian Code.
- 2. The novels of Theodosius, Valentinianus, Marcianus, Majorianus and Severus.
  - [26] 3. The Institutes of Gaius,
  - 4. The Sententia recepta of Paul.
  - 5. Thirteen titles of the Gregorian Code.
  - 6. Two titles of the Hermoginian Code.
- A short extract from the Liber Responsorum of Papinian.

It is preceded by a preamble or Commonitorium, which is published at length by Savigny, who, after a minute and critical examination of its contents. compared with other authorities, concludes, that Annianus was the referendary, or chancellor of Alaric, and as such certified the authenticity of the copies sent to the courts for their government, and thus stamped them with authority; that Goiaric was Comes Palatii, under whose superintendence the jurists engaged in the compilation labored, and who, after it had received the royal sanction, was charged with its publication and promulgation. He further asserts, that the opinions which ascribe this collection to Annianus and to Goiaric are erroneous, remarking, that such an undertaking was unsuited to a Goth.2

The opinion of Savigny appears best supported both by reason and authority.

<sup>1.</sup> Savigny, "Geschichte des Röm. Rechts." Vol. 2, p. 41, et. seq.

<sup>2.</sup> Ibid, p. 45.

The *Breviarium* was for the first time printed at Basle, by John Sichard, in 1528.<sup>3</sup>

It embraces, as has been shown, the Roman law alone, and is said to have been published by Alarie to conciliate his Roman subjects.<sup>4</sup>

[27] Alaric, having been defeated and slain by Clovis, (506,)

Theodoric the Great took the Visigothic empire under his protection, for the purpose of preserving it for his grandson Amalaric, the son of Alaric, and confided its administration to Theudes. (511.)

From this period the Franks encroached more and more on the possessions of the Visigoths in Gaul, whence they were finally expelled about the year 542.

During the reigns of the successors of Amalaric, who was the last of the race of the great Alaric, nothing is recorded worthy of attention until the reign of

Leovigild, (569-586,) whose administration was distinguished by great vigor. He quelled a revolt of the Cantabrians, captured several settlements of the Greeks on the Mediterranean, conquered the Suevi, and subdued the Basques. He was a strict Arrian and was compelled to quell an insurrection at the

<sup>3.</sup> Dupin, Profession d'Avocat, Vol. 2, No. 530.

<sup>4.</sup> Soltelo y Prieto, "Historia del Derecho Real de Espana."
83. 86.

<sup>1.</sup> Paquis. "Histoire d' Espagne et de Portugal." Vol. 1, p. 92. Dunham's "History of Spain and Portugal," Vol. 1, p. 110. "Atlas Historique de C. and F. Kruse," Table 10. Paris, 1836.

head of which was *Hermenegild*, his eldest son, who had been converted to catholicism. *Hermenegild* was defeated, made prisoner, and executed, upon his refusal to return to Arianism.<sup>2</sup>

Reccarede, (586-601,) surnamed the Catholic, the [28] son and successor of Leovigild, adopted the catholic religion, and his example was followed by the entire nation of Visigoths. During his reign, the catholic clergy acquired great influence, and did, to a certain extent, enact laws for the kingdom, through the councils held at Toledo, in which they were all powerful.

From the reign of Reccarede, until the final subversion of the Visigothic empire in Spain by the Arabs in 710, a period of a hundred and nine years, Spain was governed by sixteen different monarchs, of which Roderic was the last. During this period, of which the chronicles of the times have left us very meager accounts, the Visigoths attained their apogee; and we would be left without the means of forming an estimate of the degree of civilization they attained, were it not for the existence of one remarkable monument which has survived the wreck of their dominion. This monument, which, notwith-

<sup>2.</sup> Such is the story told by Gregorius Magnus, Dial 3, 31. Joan. Biclarensis, Gregorius Turensis, 8, 28, &c. See Paquis Hist. d'Esp. Vol. 1, p. 98, note 1. This Hermenegild was canonized towards the end of the 16th century, by Pope Sixtus V; and Ferdinand VII instituted an order, that of St. Hermenegildo, in honor of his memory. Ferdinand, as is well known, also rebelled against his father, and his sympathy for Hermenegild is therefore natural.

standing the lapse of thirteen centuries and the changes attending numerous revolutions, has not only endured, but retained its influence to this very day, is the *Forum Judicum*, more generally known by the title of *Fuero Juzgo*.

#### FUERO JUZGO.

That this code was composed in the seventh century is a fact which appears to be generally admitted; but the historians of the laws of Spain are unable to agree as to its authors, and as to the time when it was first promulgated.

[29] Masdeu attributes it to Eurie, but this opinion is refuted by Marina, Sempere, Lardizabal, and Zarate. Sempere thinks that some of the laws must be attributed to Reccarede, while Marina insists that the Fuero Juzgo was unknown until the reign of Chindasvinth, (642-649,) and that it was subsequently amended and improved during the reigns of Receswinde, (649-672,) and Ervigio, (680-687.)

The result of these learned controversies seems to

<sup>1.</sup> Ha. Critica. Vol XI, p. 76.

<sup>2.</sup> Ensayo Hist. Crit. Vol. 1, p. 32.

<sup>3.</sup> Ha. del Derecho Esp. p. 4, 84.

Introduction to the Fuero Juzgo. Edition of Royal Academy, Madrid, 1815.

<sup>5.</sup> Analysis de la Legis. Esp. Vol. 1, p. 16.

<sup>6.</sup> Ha. del Der. Esp. 84.

<sup>7.</sup> Ensayo, &c., 34.

be, that the Fuero Juzgo arose from the amalgamation of the Roman and Gothic law. The time when this fusion, which must have been gradual, took place, cannot now be accurately determined; nor is it possible to ascertain to which of the Gothic kings the laws, embodied in this collection, are to be attributed.

We know, however, a fact of incomparably greater importance, to wit, that the Fuero Juzgo became the general law of Spain, and that from the moment of its promulgation, Roman and Goth, Vandal and Suevi, previously governed by their own peculiar laws, became subject to its authority. The Fuero Juzgo is the most ancient code of Teutonic origin, which has preserved its influence even to this day. The laws of the Franks, Burgundians, Lombards, &c., have disappeared, and [30] some scattered fragments of them can with difficulty be collected from the ponderous folios of some painstaking antiquarian, like Canciani; while Visigothic law still governs a large portion of the civilized world. This fact is sufficient to interest us in the examination of its spirit and character, and affords a presumption of its superiority over the kindred legislation of the same period.

### Analysis of the Fuero Juzgo.

The Fuero Juzgo is divided into twelve books, containing fifty-four titles, comprising five hundred and

fifty-nine distinct laws. Each law, with few exceptions, is inscribed with the name of the king or council by which it was enacted; and it is the abbreviations of these names, and the differences in them, which occur in different manuscripts, which has caused so great diversity of opinion on the subject of its origin.

The best edition of this work is unquestionably that published by the Royal Academy of Madrid, in 1815. This work, which embodies, besides a learned dissertation on the law of the Visigoths by Mr. Lardizabal, a preliminary title, "De Electione principum," &c., not to be found in the foreign editions, is the one which has been consulted by the author of this introduction.

BOOK 1. Is entitled: "De instrumentes legalibus" in Latin, and "Del facedor de la ley et de las leyes" in Spanish.

It contains two titles, and provides, among other things, that the *Lawmaker* should be mild and good, [31] not only in words but in deeds, and at heart, that he should also be merciful and have God constantly before his eyes, always aiming at public utility. "El fazedor de las leyes mas debe sur de buenas costumbres que de bella fabla," &c.¹

The Law, to be useful, must be clear and brief in its terms, free from subtleties and contradictions, adapted to places and times, to all classes of people, and to each individual of every class. It should re-

<sup>1.</sup> Fuero Juzgo, B. 1, T. 1, l. 5, &c.

strain the bad from doing evil, and permit the good to dwell in peace, teach virtue and protect the people, since thus alone can it secure internal harmony, &c.<sup>2</sup>

Most of these maxims are marked by strong common sense and evident practical utility, and may be advantageously studied by modern legislators, who have on many occasions lost sight of the salutary lessons taught by experience to our ancestors, whom, with a disdain, which proves rather our ignorance than our wisdom, we stigmatize as barbarians.

Book 2. "De Negotiis Causarum." "Le las Juicios y Causas."

It contains five titles which treat of judges, their powers and attributes, modes of conducting suits, written and oral testimony, and the solemnities required in the execution of last wills and testaments.

Book 3. "De ordine conjugale." "De los Casamientos e de los Nascencias."

Embraces six titles, treating of marriage, conjugal infidelity, divorce, &c.

[32] Book 4. "De ordine Naturali." "Del Linage Natural."

Includes five titles, explaining the law of descent and the rights of inheritance, the rights and duties of guardians and orphans, modes of opening and administering successions, and the rights of foundlings.

Book 5. "De transactionibus." "De las Avenencias é de las Compras."

Including seven titles, the first of which establishes rules for donations to the church, and of ecclesias-

<sup>2.</sup> Ib. B. 1, T. 2, l. 1 to 6.

tical property, and the remaining six treat of donations, sales, exchanges, deposits, loans for consumption, (commodatum) debts, pledge and manumissions.

Book 6. "De Sceleribus et Tormentis." "De los Malfechos, é de las Penas, é de los Tormentos."

Five titles, treating of crimes and punishments.

Book 7. "De Furtis et Fallaciis." "De los Furtos é de los Engannos."

Six titles, prescribing the punishment of thieves, robbers, kidnappers, forgers and counterfeiters.

Book 8. "De illatis, violentiis et damnis." "De las Fuerzas de los dannos, é de los quebrantamientos."

Six titles, inflicting severe penalties on those taking forcible possession of other men's property, or doing injury to the same contrary to law.

Book 9. "De fugitivis et refugientibus." "De los siervos foidas, é de los que se tornan.

Three titles, treating of fugitive slaves.

Book 10. "De divisionibus, et annorum temporibus." "De las particiones, é de los tiempos, é de los annos é de las lindes."

[33] Three titles, the first of which contains dispositions in relation to the use of land by owners and tenants, the division and boundaries of land; the second treats of prescriptions; and the third, of the mode of ascertaining and fixing the boundaries of land.

Book 11. "De aegrotis, atque mortuis, et transmarinis negotiatoribus." "De los fisicos, é de los mercaderes de ultramar, é de los marineros." Three titles, the first defining the rights and duties of physicians; the second, inflicting penalties on those violating the rights of sepulture, &c.; and the third determining the rights and duties of foreign merchants.

Book 12. "De removendis pressuris, et omnium hæreticorum omnimodo sectis extinctis." "De devedur los tuertos, et derraigar las sectas y sus dichas."

Three titles, the first of which exhorts the judges to administer the laws purely, impartially and without regard to persons; directs them in criminal cases to mitigate the punishment when the offender is poor and ignorant, and forbids them, under heavy penalties and loss of office, to be guilty of exaction, or impose on the people any unnecessary expenses, &c.

The preceding brief summary of the contents of this celebrated code shows that whatever may be its merits when compared to similar compilations at the period of its concoction, it has little pretension to method and logical arrangement.

When we examine its contents more critically, we find it vastly superior not only to all the barbarous codes of the period, but in many respects to the Roman Law. When we speak of the superiority of the *Fuero Juzgo* over the law of Rome, we do not wish [34] to be understood as instituting any comparison between it and the civil or even criminal law of that country, but simply as to its political code.

The preliminary title is in point of fact a political code, defining the rights of the sovereign and the

subject, prescribing their respective rights, and placing both under the protection of the law. probably the first attempt at a written constitution of record, and, as such, necessarily imperfect, although it recognizes principles which, even at this day would be held much too liberal for a monarchial government and which it would not be safe to proclaim in any. It expressly declares, that the people have the right to depose their kings, when the latter fail to do their duty, a maxim frequently acted on in practice, but which will be sought for in vain in any political charter. The doctrine of the Visigothic code, on this head, was both brief and pithy: "Rey seras si fecieres derecho, et si non fecieres derecho, non seras rey." (Thou shalt be king, if thou doest right, and if thou doest not right, thou shalt not be king.1

In the administration of justice, we also find doctrines recognized calculated to ensure its prompt and efficient execution.

Thus, the judge was required to follow the law strictly, and in case it was silent, to refer the matter to the king.2

He was bound to terminate all lawsuits within eight days, unless a holyday intervened, under the penalty of [35] paying all costs and damages arising from a longer delay.1

He had the power to compel parties and witnesses

<sup>1.</sup> l. 2. Prelim. Title.

Fuero Juzgo, l. 11, T. 1, B. 2.
 Fuero Juzgo, l. 20, T. 1, B. 2.

to appear before him.2

In deciding causes, he was bound, 1st, to require written evidence; 2dly, oral proof; and where these could not be obtained, he could, 3dly, require the oath of the parties.<sup>3</sup>

In all cases appeals were allowed to the supreme tribunal, presided by the king in person.<sup>4</sup>

The bishops were especially charged to protect the poor and watch over the faithful administration of the law, for which purpose they had the power of suspending such judges as were unfaithful or incompetent.<sup>5</sup>

The responsibility of the judge was strictly enforced, and if he gave an erroneous judgment, he was bound to pay the party cast double the amount, and if he was unable to do so, he was punished with fifty lashes.<sup>6</sup>

So, if the judgment was reversed on appeal, the judge was bound to pay the appellant double the amount.

Besides, every suitor had the right to recuse the judge without assigning any reason for so doing.

The severity of the judicial responsibility was, [36] however, mitigated in this, that the judge could always exempt himself from the ignominious punishment of whipping, by making oath, that the error

<sup>2.</sup> Ib. l. 17, T. 1, B. 2.

<sup>3.</sup> Ib. l. 21, T. 1, B. 2.

<sup>4.</sup> Ib. l. 22, T. 1, B. 2.

<sup>5.</sup> Ib. l. 28, T. 1, B. 2. 6. Ib. l. 19, T. 1, B. 2.

<sup>7.</sup> Ib. l. 22, T. 1, B. 2.

arose from ignorance, and was not the result of favor or solicitation.

So, in cases of appeal, the judge, if bound to pay the appellant double the amount of his judgment, was, when his decree was confirmed, entitled to receive from the appellant, an amount equal to the first condemnation.<sup>2</sup>

Witnesses were carefully examined, and perjury was severely punished. The false witness, besides being bound to satisfy the injury done by his testimony, was forever after disqualified to give evidence, and in some cases, he became the slave of him against whom he had testified.<sup>3</sup> Inciting to give false testimony was punished with equal rigor.

The criminal law was in general based on the *lex talionis*, an eye for an eye, &c., except in cases of wounds inflicted with deadly weapons, on account of the danger that the punishment might exceed the offence. Murder was punished with death, and aiders and abetters received two hundred lashes, had their heads shaved, were condemned to pay five hundred [37] sueldos, and, in cases of inability to pay this

<sup>1.</sup> Fuero Juzgo, l. 19, T. 1, B. 2.

<sup>2.</sup> In Sweden there exists yet a remnant of this law; since the appellant in certain cases from decisions of the Aulic Court. (Hof Ratt) is required to deposit a sum of money, which is returned to him, if the sentence is reversed by the appellate tribunal, (Högsta Domstol) but which if the decree of the inferior tribunal is affirmed, is distributed among the judges of such court. This money is called "Revisions Skilling."

<sup>3.</sup> Fuero Juzgo, 1. 6, T. 4, B. 2.

fine, they became slaves of the deceased man's heirs.1

The laws of descents, contracts, &c., were in general conformable to the Roman law.

The Fuero Juzgo, remarkable not only on account of its antiquity, but as an authentic monument of an age now almost unknown, has attracted the attention of distinguished writers of various countries. The opinions formed of its merits are remarkably diversified, as will appear from the following review of some of the most prominent:

Cujaccius, for example, considers this code as nothing else than the Roman law, modified to suit the conditions of the Goths. He says, "Gothorum, sive Wisigothorum reges, qui Hispaniam et Galliam Toleto sede regia tenerunt, ediderunt XII. constitutionum libris æmulatione codicis Justiniani, quorum auctoritate utimur libenter, quod sint in ei omnia petita ex jure civili, et sermone latino conscripta, non illo insulso cœterarum gentium, quem non numquam legimus ingratis, ut gens illa maximé quœ consedit in Hispania, plane cultior caeteris, hoc argumento fuisse videatur." "De Feudis," b. 2, tit. 11. No one will dispute that Cujas was a competent judge both of the latinity and the law.

Robertson, however, thinks that the political machine of the Visigoths was ill adjusted, and expresses an unfavorable opinion both of their government and their laws. History of Charles V. Introd. section 3, p. 69.

<sup>1.</sup> Fuero Juzgo, l. 12, T. 5, B. 6.

[38] Montesquieu treats them still worse, since he calls these laws puerile, awkward, idiotic, without aim, full of rhetoric and void of sense, frivolous in substance, gigantic in style. "Espirit des Lois," b. 28, chap. 1.

John Von Muller, in his Universal History, adopts the opinion of Montesquieu. Vol. 1, p. 301, book 6, chap. 7.

C. F Von Savigny, although he expresses himself with more reserve, and admits that the Visigothic law shows a higher degree of culture, and has some pretensions to philosophy and a practical knowledge of the law, still does not appear to entertain a very favorable opinion of it, (Geschichte den Romischen Rechts im Mittelalter, vol. 2, p. 72), since he characterizes the opinion of Montesquieu as very striking, "sehr treffend," and speaks of the opinion of Gibbon, who differs from him, as remarkable, "merkwurdige." Ib. p. 73, note b.

Gibbon says, that Montesquieu has treated the Visigothic code with excessive severity, and adds, I dislike the style, I detest the superstition; but I presume to think, that the civil jurisprudence it presents, displays a more civilized and enlightened state of society than that of the Burgundians, and even of the Lombards. Decline and Fall of the Roman Empire, chap. 28, note 125.

Carl Von Rotteck, in his Universal History, expresses a favorable opinion of this code. Algemeine Gesch, vol. 4, p. 193.

Guizot maintains, that this code alone, among all the barbarian laws, is formed by the philosophers of the age; that it abounds in general ideas, and theories [39] foreign from the manners of barbarians, and he sums up by saying: "En un mot, la loi Visigothe toute entiere porte un caractere savant, systematique, social." Cours d'Hist. Mod. vol. 6, sect. 13, p. 27.

As to the Spanish writers who have examined the subject, they treat the opinions of Robertson and Montesquieu as in the highest degree preposterous.

Don Francisco Martinez Marina affirms that both of them rave (desatinaron) when they speak of this code, and that their accounts of the ancient political institutions of Spain, and her civil and criminal laws, are idle dreams. The most charitable construction he can put on their opinions is, that they had never read the laws they undertake to criticise. "Ensayo Hist. Crit.," vol. 1, p. 45, note 2.

The above, is far from being a solitary example of the errors into which distinguished writers have been betrayed, by want of competent knowledge, or by superficial examination of the works of which they have expressed an opinion.

If we examine the above unfavorable opinions critically, it is easy to determine their relative value. Robert's for instance, is entitled to no weight, since he admits that he had not had an opportunity of examining the Visigothic code and complains of the difficulty of procuring books on the subject.

J. Von Muller gives Montesquieu as authority for his opinion, which, as compiler, was clearly sufficient on a subject which he does not pretend to have himself critically examined.

Montesquieu's opinion is, therefore, the only one which deserves examination, and with all the respect [40] due to this illustrious author, it cannot be concealed that his love of antithesis, and his veneration for the Roman law have betrayed him into the expression of an opinion, which no one who examines the subject impartially can ever be disposed to sanc-The vague and incoherent expressions which he applies to those laws, such as "pueriles, gauches, idiotes, frivoles dans le fond gigantesques dans le style," are mere rhetorical flourishes, neither very intelligible nor applicable to the subject, and they leave in the mind no distinct idea of the defects which he attributes to these laws. What species of style is the "style gigantesque," what is a "loi idiote." or "gauche?" Those questions are more easily asked than answered; and we hold, that though a distinguished writer may be pardoned for being occasionally guilty of similar aberrations from the rules of reason and common sense, it is clearly an act of weakness, which ought neither to be imitated nor invoked as authority.

We have already shown the opinion of Cujas, who was, to say the least, as competent a judge as Montesquieu, both of the style and the contents of these laws; but above even this opinion we place that of Guizot, who has examined the subject with incom-

parably greater ability and care than any of his predecessors, and which is entitled to all the weight which learning, profound research, impartiality and sound criticism can give to his judgment on this subject.

Even the learned Savigny admits this, when in answer to a criticism of Guizot, on his opinion of the Visigothic code, which appeared in "Revue Francaise," for 1828, No. 6, p. 202-244, he styles his disser-[41] tation very instructive and profound, (sehr lehrreiche und tief eingehende abhandlung,) and winds up by saying that the difference between them arose from a misunderstanding, and that, in point of fact, there was no difference in their opinions. (Gesh. d. Röm. Rechts. Vol. 2, p. 67, note A.) This admission gives still greater authority to that of Guizot, since M. de Savigny is, no doubt, the greatest living jurist, and his opinions are never formed without the most deliberate and conscientious examination.

The final judgment of Guizot on the Fuero Juzgo is summed up in his "Cours d' Histoire Moderne," Vol. 1, p. 383, and is as follows:

"In the Fuero Juzgo all matters of legislation are to be met with. It is neither a collection of ancient customs, nor a first attempt at civil reform; it is a universal code, a political, civil, and criminal code, a code systematically arranged, and framed for the purpose of providing for all the wants of society. It is not only a code, or assemblage of legislative provisions, but a system of philosophy,

a doctrine. It contains dissertations on the origin of society, nature of authority, civil organization, and the composition and publication of laws. It is not only a system but a store-house of moral exhortations, of threats and of advice.

"The Forum Judicum, in short, has, at the same time, a legislative, philosophical and religious character; it partakes of law, science and a sermon.

"The cause of this is simple; the law of the Visigoths is the work of the clergy, it was formed in the Councils of Toledo. These councils were the national assemblies of the Spanish monarchy. Spain presents the [42] singular characteristic, at this early period of her history, that the clergy have there exercised much greater influence than any where else. The councils of Toledo were to Spain what the Field of Mars or of May was to the Franks, the Wittenagemote to the Anglo-Saxons, and the general assembly of Pavia to the Lombards. In these councils the laws were adopted, and there were debated the great interests of the country. The clergy was, so to say, the centre around which royalty, the lay aristocracy, the people and the whole nation grouped themselves. The code of the Visigoths is evidently the work of ecclesiastics; it has the faults and the merits and the merits of their spirit. It is incomparably more rational, more just, more mild, more precise; it understands much better the laws of humanity, the duties of government, the interests of society, and aims at attaining a more elevated and a more complex end than the other barbarous legislations. But at the same time, in a political point of view, it leaves society with fewer guarantees; abandoning it, on the one hand, to the clergy, and on the other, to royalty. The laws of the Franks, Saxons, Lombards, and even the Burgundians, retain the guarantees, arising from their ancient manners, their individual independence, the rights of every proprietor within his own domain, the participation of every freeman, at least to a certain extent, in the affairs of the nation, in the administration of justice, and in the formation of the acts of civil life.

"In the Forum Judicum nearly every vestige of the primitive German Society has disappeared, and a vast administration, semi-ecclesiastical, semi-imperial, holds the nation in its grasp."

#### CHAPTER IV.

### THIRD PERIOD.

# Spain under the Arabs.

This period, which is the longest in its duration, is likewise in many respects the most interesting, as it exhibits, during a lapse of more than seven centuries, a nation gradually organizing itself, amidst scenes of perpetual warfare; and developing its institutions and legislation under the pressure of an infinite variety of disturbing causes, all of which contributed, in some degree, to give them direction.

Before attempting to sketch this period, it is requisite to give a brief outline of the physical aspect of Spain, without which, the subsequent narration would hardly be intelligible.

# Physical Aspect of Spain.

"No spot on the globe, of equal extent," says Col. Bory de St. Vincent, "has a more favorable climate or a greater variety of productions than Spain."

Separated by a mountain chain, ninety-two leagues in length, from the rest of Europe, it possesses a frontier easily defended; while its coasts, upwards of six hundred leagues in extent, present excellent harbors on [44] two oceans. The productions of the temperate zone and of the two tropics are here to be found intermingled in a soil which in many places possesses extraordinary fertility, and offers the strongest inducements to agricultural labor. Nature has also bestowed, with prodigal hand, throughout the vegetable, animal and mineral kingdoms, wealth, inviting the industry of man, and which, if properly improved, could not fail to render Spain one of the most productive and flourishing countries in the world.

Seven distinct ranges of mountains form, as it were, the framework of Spain, and determine its physical character. These are,

- 1. The Pyrrenean Mountains, which run nearly east and west, from the eastern extremity of Catalonia to the western limits of Gallicia. They are generally composed of granite, and attain a considerable elevation. From this primitive chain others depart, sweeping the country from north to south, and deflecting sometimes to the east, but more frequently to the west.
- 2. The Iberian Group, which takes its rise near the sources of the Ebro, and thence pursues a sinuous course from N. W. to S. E., separating Valencia and Arragon from the two Castilles, and extending S. as far as Murcia.

3. The Carpetano Vetonic Group, running from N. E. to W. S. W., separating Old and New Castille, and marking throughout nearly its whole extent a line dividing Spain into two distinct climates. This mountain chain, known as the Carpetanic by the ancients, disappears towards the coast of Portugal.

[45] 4. The Lusitanian Group, less elevated than the preceding, rises in New Castille, and, pursuing a westerly direction, terminates also in Portugal.

5. The Marianic Group, which includes the celebrated mountains of Sierra Morena, and abounds in volcanic and schistous formations. It forms the northern boundary of the ancient and beautiful kingdom of Cordova.

6. The Cuneic Group, the least extensive of all, and which appears to be but a counterfort of the preceding, disrupted by the Gaudiana. It extends about twenty leagues towards the W. and disappears in Portugal, where it separates the provinces of Alentejo and Algarve.

7. The Bætic Group, which forms a species of curve about the western end of the Mediterranean, beginning in the neighborhood of Tarifa, and terminating in Murcia. This range, comprising the loftiest summits of the peninsula, is called the Sierra Nevada in Granada, where are to be found the peaks of Mulhacen and of Veleto, which rise to an altitude of upwards of eleven thousand feet. The Alpujarras, so celebrated in the Moorish wars, also appertain to this group.

Independent of the preceding regular chains, isolated peaks, thrown as it were by chance on the surface of the soil, meet the eye both in the plains and borders of the rivers.

Parameras, or deserts, resembling the steppes of Tartary, are occasionally found intervening among the mountain ranges, and attain in many places considerable elevation.

- [46] Spain, considered in reference to its climate and productions, may be divided into four great divisions, partaking in some degree of the character of Europe, Asia, Africa and America, viz:
- 1. The Cantabrian or northern division, entirely European in all its features, resembling Cornwall, Wales and Northern France. It occupies the northern declivity of the Pyrenees, and is very narrow, being from twelve to eighteen leagues in width. The climate of this region, from which the genial breezes of the south are excluded by the snow-clad summits of the Pyrenees, is cold, but its inhabitants, the Basques and the Asturians are a hardy and laborious race, and descend from the ancient Vasdules and Cantabrians, who were never completely subjugated by any of the invaders of Spain.
- 2. The Lusitanian, or western division, the most extensive of all. Four rivers, running from east to west, water this region, viz: the Miño (Minius); the Duero (Durius): the Tagus, and the Guadiana (Anas.) It contains many basins, and several groups of mountains, which renders it difficult to

appreciate its general character. Much warmer than the preceding division, it is less so than the two following in the same latitudes. The vine grows every where, but the wine wants flavor. The apple tree, so abundant in the preceding region, has disappeared, and the olive begins to make its appearance, although the oil it produces is in small repute. Chestnut trees and oaks abound in the forests, and plants peculiar to the Spanish Flora are abundant. Plants of the islands in the Atlantic, and even of America, are easily naturalized, and thrive as [47] if indigenous. This division is inhabited by the Portuguese and the Castillian, who detest each other. The former are of pure Celtic descent; the latter descend from the Celtiberians.

The Iberian, or eastern division, comprehends 3. the basin of the Ebro, one of the largest rivers of Spain, and several other rivers, of which the Llobregat and the Guadalaviar, the Jujar and the Segura, all flowing from west to east, are the most considerable. This appears to be the climate of predilection of the olive; the wines are abundant and highly colored, carob trees and agaves become frequent. The cotton plant, though not cultivated, attains perfection, and rice and mulberry trees constitute the wealth of the country, which towards the south, produces small palms, (chamarops) and assumes more of an African character. The inhabitants of this section are descendants of the Iberians, Celts, Phenicians, Carthaginians, Greeks, Romans, Goths, Jews and Arabs, and from this admixture has arisen a national character differing widely from that of the inhabitants of the preceding division. The latter are proud, constant, but indolent; the former are active, jealous of their independence, but extremely versatile.

4. The Bætic, or southern division, bounded on the south by the Mediterranean, the Straits of Gibraltar and the Atlantic, presents an entire African aspect. Here no ice is ever found, except on the summits of the mountains; date trees are abundant and their fruit matures. After traversing the Sierra Morena, the agave becomes the common enclosures of the smallest rural estate, and orange and lemon trees form forests [48] often of considerable extent. The banana grows in the open air, and cotton and sugar plantations border the rivers. The myrtle, and a variety of other odoriferous plants embalm the solitudes of this delicious country, and flowers of every hue deck the slopes of the mountains, and fringe every crevice excavated by the mountain torrents. This is the only country in Europe where the chameleon is to be met with, and it presents many other characteristics denoting its African character.1

<sup>1.</sup> See "Itineraire descriptive de l' Espagne," par le Comte Alex de Laborde, 3d Ed. Paris, 1827, Vol. 1, p. 2 to 50, where the reader will find a notice of the configuration of Spain, by Alex. de Humboldt, and an essay on its physical geography by Col. Bory. de St. Vincent, both of which are excellent in their kind, as was to be expected from writers of such merit.

Such is the physical appearance of the country which, at this period, was under the dominion of the Goths, but which was destined, in a few years, to acknowledge the sway of very different masters.

# Dominion of the Arabs in Spain.

The Arabs, called by the Greeks Scenites, (from skene, a tent,) were originally from the land of Yemen, where they occupied themselves in agriculture and pasturage, feeding their flocks in the deserts of Hedjaz, and employing their leisure in pillaging on their frontiers. This people, whom neither Cyrus, Alexander, nor the Romans had been able to subdue was from time immemorial divided into families, or tribes, each govern- [49] ed by his own chief. Possessing nothing in common but their language, these tribes lived in a state of perpetual rivalry, or rather hostility. When peace reigned at home, the Arabs, who had the reputation of being excellent archers, hired their services to the rulers of Egypt, Their religion was that of the Syria and Persia. ancient Sabeism, or adoration of the stars, and each tribe had its own protector in the heavens; thus, the tribe of Hhomayr adored the sun; that of Kanénah, the moon; Lakhm, the planet Jupiter; Quays, Sirius; Mysam, Aldebaran, &c.

The Arabs continued for a long time in a state of primitive ignorance and patriarchal liberty, and until a few years before the advent of their prophet, neither writing nor the mechanical arts appear to have been known to the tribes of Ishmael. Shortly previous to the birth of Mahomet, they began, however, to acquire some knowledge of the arts of civilized life. They had learned to write from the Syrians, and had built a few towns on the borders of the Red Sea and the Persian Gulf, and they carried on, by means of caravans, an active commerce with Egypt and the Indies.

Mohhamed ben Abdallah al Quoraysh, or Mahomet, son of Abdallah, of the tribe of Quoraysh, their prophet, was born on the 16th July, 572.

The history of this extraordinary man, who, by founding a new religion and an empire, changed the aspect of the world is well known. His audacity in conceiving, and his perseverance in executing his plans, as well as his genius and the indomitable energy to which he owed his success, have been so often pourtrayed, as to render further comment unnecessary. Religion [50] served him but as a step by which to ascend a throne; and when there, he united in his single hands the power of a monarch, a pontiff and a legislator.

Under the successors of Mahomet, Aben Bekr and Omar, the Arabs swept, like an irresistible torrent, over the fairest portions of Asia and Africa, and subdued many an empire, which, till then, had not even suspected their existence. In Africa, after subjugating Egypt, Mauritania, Cairvan, Barca, Carthage and Tangiers, they took possession of the west-

ern coast, which now forms the empire of Morocco.

The Berbers who inhabited this country, were, after a most obstinate resistance, conquered by the Wali (Ouali, governor,) Mouza ben Nozeir, and embraced Islamism.

After accomplishing this conquest, Mouza, who, from his palace at Tangiers, had a full view of the fertile shores of Andalusia, began to ponder on the possibility of enlarging his conquests by the addition of Spain.

The disturbed state of that country favored the views of the ambitious Wali, who after obtaining the consent of the Caliph of Damascus to the invasion, conquered Spain, after defeating Roderic, the last king of the Visigoths, in the space of about two years.

The causes of so extraordinary a success by a handful of adventurers in a country like Spain, which presents so many points where successful resistance might have been offered, are yet unexplained, and will probably never be satisfactorily elucidated. That the dissensions and the misrule of the Visigoths favored the invaders cannot be doubted; but even this know- [51] ledge is insufficient to account for the inconceivable rapidity with which the Arabs conquered a country which had resisted the Romans for two centuries.

Spain, after it was subdued by the Arabs, was at first governed by emirs, appointed by the Caliphs of Damascus. The expulsion of the family of the Ommiades from the throne of Mahomet, by that of the

Abbasides, led to the establishment of the Caliphate of Cordova by Abderrahman, a descendant of the Omeyas, in the year 756. From this period until the time of Almanzor, or for about two centuries and a half, the Arabs were incomparably the most civilized people of Europe, which owes them its knowledge of many an art and science, unknown to the Greeks and the Romans, and which the inventive genius of the children of the desert had discovered and brought to a high state of perfection.

After the death of Almanzor, the Berbers expelled the family of the Ommiades from the Caliphate of Cordova, of which the *Almoravides* took possession and governed for a short period, until they in their turn were deprived of it by the *Almohades*.

With the Ommiades disappeared the government of the peninsula by the Arabs, since both the Almoravides and Almohades were Berbers, and are known in history by the designation of Moors.<sup>1</sup>

[52] The destruction of the Caliphate of Cordova and the struggles between the Arabs and the Moors, which were long continued and of a very sanguinary character, were highly beneficial to the Christians, whose condition during this period we shall now briefly examine.

<sup>1.</sup> See "Essai sur l' Histoire des Arabes et nes Mores d' Espagne," par Louis Viardot, Paris 1833, 2 Vol. "Historia de le Dominacion de los Arabes în Espana," par José Antonio Conde. Madrid, 1820-21, 3 Vols. "Histoire d' Espagne et de Portugal," par M. Paquis. Paris 1836, 2 Vols. Vol. 1, p. 266, &c. Dunham's "History of Spain and Portugal. Book 3.

## Condition of Christian Spain.

After the conquest of Spain by the Arabs, (712) a handful of Christians, rather than submit to the rule of the Infidels, sought refuge in the fastnesses of the mountains of Asturia. Few at first, their numbers rapidly increased by the oppressions which invariably accompany conquest, even in its mildest form, and they were thus enabled in the sequel successfully to resist the invaders.

The history of this period is very obscure, and all that is known with certainty is insufficient to enable us to give a connected narrative of the rise and progress of the little kingdom of *Oviedo*. A certain Pelayo, son of a Cantabrian prince, of the royal house of Chindasvinth, is said to have been the first leader of the Christians, and to have defeated the Arabs with great slaughter at the battle of *Covadonga*. Pursuing the advantage thus obtained, Pelayo defeated the Infidels in several subsequent encounters, and finally established a small independent kingdom, destined, after many vicissitudes and combats, to expel the Mohammedans from the peninsula.

[53] Upwards of seven centuries intervened, however, before this object was finally accomplished; and we regret, that our space does not permit us to attempt anything but a very brief and imperfect sketch of this memorable contest.

From the conquest of Spain by the Arabs, until the establishment of the Caliphate of Cordova, in 756, a period of about forty-two years, Spain was an appendage of the Caliphate of Damaseus, and as such was governed by eighteen different emirs, including Tharic and Mouza, who achieved the conquest. The jealousy of the caliphs, the remoteness of the metropolitan government, and the ambition of the emirs, led, during this period, to frequent changes in the government of Spain, always accompanied by internal dissensions among the Arabs, which were favorable to the establishment of the Christians.

During the reign of the Caliphs of Cordova, that is, from the middle of the eighth to the beginning of the eleventh century, such was the superiority of the Arabs and their power, that the Christians, notwithstanding the increase of their number, were restrained to a narrow strip of land on each side of the Pyrrenees.

Efforts were frequently made by the latter to extend their dominions, but they were usually confined to mere predatory incursions on the Moslem territory, called algaradas, in the language of the period, which were productive of no permanent advantage. The mode of warfare adopted by the Arabs was, in a great degree, conducive to the preservation of the Christians, at this epoch, when they might readily have been crushed, had the Moslems exerted themselves to accomplish this object.

[54] The Arabs never engaged in war, except

with a view to conquest or plunder; but as the rugged defiles and barren rocks of Asturia offered no inducement of conquest to the possessors of the fertile regions of Andalusia, and the poverty of the inhabitants held out few temptations to plunder, they contented themselves with repelling the invasions of the Christians. Indeed, the Arabs of this period seem to have regarded the Christians, who nestled in the gorges of the Pyrrenees, rather as a band of outlaws, than as a regularly organized nation; and conscious of their ability to resist and to chastise them, contented themselves with driving them within their borders, whenever their incursions gave them annoyance.

This policy was, no doubt, a capital error for which they paid dearly in the sequel, although, in point of fact, it was much nearer the truth than the historians of Spain are willing to admit. The Pelayos, Alonzos, Ordoños, Ramiros, &c., of this period, though decorated with the title of kings were, in reality, petty chieftains, without fixed domiciles or any authority which could give them a just claim to such a title. So miserable was the condition of the Christians at this time, that the eating of wheat bread was considered a conclusive proof of nobility, even in the rich province of Catalonia.

Sempere, "Hist. del Derecho Esp." p. 129. Risco, "Espana Sagrada," Vol. 39, trat. 73, cap. 17.

<sup>2.</sup> El Baile, siendo muerto, estropeado, herido, o aprisionado se dice en uno de sus Usages, si es noble, y come pan de trigo diarimente, reciba la misma satisfaction que un caballero, pero el baile plebeyo no reciba mas que la mitad." Usage, 13. Sempere d. Ha. d. Der. d. Esp. 127.

[55] After the death of Almanzor, (1001) the empire of the Arabs, upheld by his vigor and ability. although it remained in peace for a few years longer, while his son Abdelmelik remained hagib (chancellor) of the feeble *Hischem*, was fast hastening to decav. The inherent weakness of despotism, in all its various forms, is never more apparent than when the power is lodged in weak or unskilful hands. Hischem, educated in the palace, where he was surrounded by women, and carefully excluded from the cares of state, was neither capable of governing his kingdom nor of selecting proper persons to do it in his place. The result was inevitable; a victim of the intrigues of his favorites, he soon became involved in war, was dethroned, and though temporarily restored to a power which he never knew how to direct, he at last disappeared at the storming of Cordova, thus terminating his inglorious career by a death as inglorious as it was obscure, about 1012.1

From this period, the Caliphate of Cordova continually disturbed by civil wars, excited by the governors of its different provinces, all equally ambitious to possess the supreme power, remained involved in anarchy, until it fell a prey to the *Almoravides*. (1094.)

In these wars the Christian princes were frequently engaged as allies of the Moslems, and profited occasionally by this circumstance to extend their own dominions. The most remarkable event of this kind

<sup>1.</sup> Viardot, Vol. 1, p. 126.

is, no doubt, the capture of Toledo by the king of Castille, Alonzo VI, in 1085. The Christians were,

[56] however, at this time warring among themselves, and thus unable to profit by the dissensions among the Infidels.

The Almoravides, like the Arabs, were originally from the land of Yemen, and appertained to a tribe called Lamtounah. Expelled from their native country by hostile tribes, they had, after wandering through Asia, finally settled in Africa, beyond the mountains of Daren, where they lived after the manner of the ancient Scenites. About the middle of the 11th century, 1050, Abdallah, an Inman of Fez, appeared among them, and converted them to the Mohammedan faith.

Abdallah, who had been educated in the schools of Andalusia, soon acquired complete ascendency over these rude children of the desert, and was looked upon with scarcely less reverence than Mahomet himself. This new prophet named his followers Almoravides, (El Morabethyn) or Morabites, vowed to God, and following in this respect the example set by the founder of his sect, he inspired them with military ardor, and led them to the conquest of Mauritania. In this expedition Abdallah perished, but the impulse was given, and his disciples pursued it with ardor, conquered Mauritania and built the city of Morocco. Here Youzef ben Taschfyn, their leader, established his residence and the centre of his power, which increased with such rapidity, that in less than

twenty years he found himself master of that portion of Africa lying between the coast of Nigritia and the ancient Carthage.

Such was the situation of Youzef, whom all the historians of the times describe as a man endowed with [57] the most estimable and brilliant qualities, when he was invited by the Emirs of Spain, then sorely pressed by the Christians, to come to their assistance. Youzef complied with their request, and defeated the united forces of the kings of Castille, Arragon and Navarre, on the plains of Zalaca, near Badajos, in 1086. Disgusted with the perpetual dissensions of the rulers of Spain, which broke out anew as soon as the impending danger was over, and which he found it impossible to reconcile, Youzef retired to his African dominions, without profitting by his victory. This afforded the Christians time to breathe, and enabled them to resume offensive operations on various points. Again the Arabs had recourse to Youzef, and again did this warrior obey their summons, but convinced that a kingdom, governed like Cordova, must inevitably perish in the hands of the emirs, he resolved to conquer it and annex it to his own dominion. This undertaking was soon accomplished; and in 1094, Youzef found himself master of the whole of that portion of Spain, which had lately appertained to the Arabs.1

The Almoravides, after remaining in possession of Spain for little more than half a century, were

<sup>1.</sup> Viardot, Vol. 1, p. 176.

in their turn expelled by the Almohades, (Al Mouahhedyn, Unitarians.)

This was a new sect, founded by Mohammed ben Abdallah, called Mahdy, (the prophet,) who, after being exiled from Morocco, had settled in the mountains of Daren, whence, as soon as he had collected a sufficient number of followers, he sallied forth, resolved [58] to convert by the sword those who were otherwise unwilling to adopt his doctrines.

After many battles, the *Almoravides* were expelled from Africa, and finally from Spain, about the year 1156.

This change of government had little or no influence on the condition of the Arabs, who still continued tributaries of Africa; but it enabled the christians to extend their conquests, and led to the final expulsion of the Mahommedans from the Spanish territory. It is true, that the rashness of Alfonso IX. caused his defeat at Alarcos, (1195,) but the generosity of Yacoub ben Youzef in liberating his prisoners, and his immediate return to Africa, deprived him of the fruits of this victory.

Hitherto the Arabs had had a decided superiority over the Christians, who, for the space of five centuries, have either been defeated or forced to retreat, whenever the Moslems seriously undertook to check their invasions. A period is now approaching when this state of affairs is about to be reversed, and when the standard of the crescent is every where compelled to retire before that of the cross.

This epoch commences with the battle of Las Navas de Tolosa, a pass in the Sierra Morena, which took place on the 12th July, 1212, and where the power of the Moors was effectually broken. sensions and rivalries among the Christians prevented them for some time from taking advantage of their position; but in 1224, Ferdinand III. of Castille, known as St. Fer- [59] dinand, and James I., El Conquistador, of Arragon, having quieted their kingdoms, united for the purpose of expelling the Ishmaélites. The period was favorable; the Arabs were warring among themselves, and the most frightful anarchy prevailed throughout their dominions. After various minor successes, St. Ferdinand, who had united the crown of Leon to that of Castille, (1230,) captured the city of Cordova, (1236,) and finally conquered Seville, (1248,) and thereby virtually put an end to the Mahommedan power. In the meantime James, of Arragon, had not been inactive, but had conquered Valencia and the greater part of Murcia. All that therefore remained to the Arabs, formerly so powerful in the peninsula, was the small kingdom of Granada, which was governed by Aben Alahamar, who, to preserve it, had to acknowledge himself the vassal of St. Ferdinand.

Henceforth the influence of the Arabs and Moors is no longer felt in the history of Spain, and the memory of their deeds, obscured by time, are only rescued by tradition, or revived by the view of some monument, like the Alhambra, which still survives, a melancholy memento of a race which once was great and powerful.

It is true, that Granada still continued as an independent sovereignty for more than two centuries after the conquest of Seville, but its rulers exercised scarcely any influence beyond their own petty domain. Its history forms a brilliant and beautiful episode in the general history of the peninsula until its subjugation in 1492, although, in a political point of view, its power can hardly be appreciated.

[60] If we revert to the progress of the Christians from the commencement of their struggles with the Mahommedans, we find that at first they maintained, with difficulty, a precarious existence in the mountain gorges and caves of Asturia. Hence, by degrees, they extended their sway over the country intermediate between the Pyrenees and the Carpethanic mountains on the one hand, and the Mediterranean Sea, the Iberian mountains and the Pyrenees on the other. In the first period was formed the little kingdom of Oviedo, and afterwards Leon, and in the second Navarre, Castille and Arragon. In the third period, Arragon and Castille went on enlarging their boundaries and gradually extending them, the former to the confines of Murcia, and the latter beyond the mountains of Toledo. In the fourth, the Sierra Morena no longer opposed an effectual barrier to the progress of the Christians, and Cordova and Seville became an appendage of the crown of Castille, while the kingdom of Portugal asserted and maintained its independence on the western coast of Spain.

The Arabs, who, during a period of more than five centuries had held possession of nine-tenths of the peninsula, were confined to the small kingdom of Granada, where, owing to the dissensions among the Christians, they remained in comparative security, until conquered by Ferdinand and Isabella.

During the struggle between the Christians and the Mahommedans, which continued for nearly eight centuries, numerous changes occurred in the customs, manners and laws of the former.

[61] The Goths, as we have seen, had, at the time of the Moslem invasion, consolidated their empire, and were governed by the Fuero Juzgo. The Mahommedans adopted a policy well calculated to conciliate the conquered, who were permitted to retain their laws, and even to exercise their religion, on condition of not intermeddling with that of the conquerors. The Christians of Spain, who chose to remain under the dominion of the Arabs, and who were called Moz-Arabs, enjoyed the protection of their own laws, and were not held amenable to those of their conquerors.

The independent Christians knew in the commencement no other legislation than that of the

<sup>1.</sup> This word is by some supposed to be a corruption of Mixti Arabes, and by others to be derived from Mosta'rab, which in the language of Yemen, is said to mean made or become Arab. Viardot, Vol. 2, p. 66, Note 1.

Fuero Juzgo, but the peculiarity of their situation, and the pressure of circumstances, compelled them, in the course of time, to adopt many modifications and changes in their ancient jurisprudence, which we shall attempt briefly to explain.

The Spanish Christians formed, at a very early period, alliances with the neighboring Franks, and were often indebted to their aid for success in their enterprises against the Arabs and Moors. In the course of time, and as the kingdoms of Navarre, Castille, Arragon, Portugal, &c., rose in power and importance, Frankish princes became the sovereigns of these countries, sometimes by marriage, sometimes by inheritance; and by these means new customs and laws were introduced and engrafted on those of the Goths.

[62] The feudal system was introduced at an early period in France, and thence transplanted into Spain, where it does not appear to have found as ready a reception, or to have taken as deep roots as in many other parts of Europe.<sup>1</sup>

Still, it can hardly be doubted that the feudal organization prevailed to a great extent in Christian Spain, and contributed efficaciously to the extension and preservation of the territories conquered from the Mohammedans. These conquests were made gradually, and for many centuries held by the most precarious tenure, since whenever the Arabs undertook seriously to oppose the incursions of the

<sup>1.</sup> Zarate, "Analysis de la Legisl. Esp." Vol. 1, p. 32.

Christians, the latter were invariably compelled to retreat within their ancient limits. It was during this period that Castille derived its name from the number of castles therein erected for defence against the Infidels,<sup>2</sup> and these strongholds were, in point of fact, so many feudal domains, held on the usual conditions of fealty and homage.

The Spaniards of that period understood perfectly well that patriotism, valor and fidelity were most to be relied on when connected with individual interest, and that to secure the public benefit, it was requisite to ally it with private advantage. Hence, the sovereigns of the country granted freely, from the domains conquered of the Arabs, fiefs on various conditions, and these estates became hereditary in the hands of the descendants of the first grantees.

The history of Spain from the 11th to the 15th cen- [63] turies shows the improvidence with which these grants were made, and the distress to which the monarchs were often reduced in consequence of the alienation of the royal domain. Another evidence of the same fact is furnished by the exorbitant power acquired by the *Hijosdalgos* and *Ricoshomes* of this period, which frequently neutralized that of the sovereigns, and always cramped their undertakings.

This power became at last so intolerable, that the kings were compelled to counteract it by all

<sup>2.</sup> Dunham, Vol. 2, p. 147.

means within their reach, and hence arose a third power in the State, the municipal power.<sup>1</sup>

It is not to be supposed that the municipal power was a royal invention; it had existed from time immemorial; but in consequence of the peculiar situation of Christian Spain, it acquired there an extension and a vigor which enabled it successfully to resist the encroachments of the aristocracy.

The conquests of Toledo, Cordova, Seville, and other cities, whence the Ishmaelites were either expelled or retired voluntarily, rendered some mode of increasing their population necessary. To effect this, and to induce the inhabitants of other portions of the peninsula to remove, and locate themselves in these conquests, liberal donations of land were given them, and certain privileges were secured to them by cartas pueblas, or fueros municipales, which varied according to circumstances.

These fueros usually enabled the citizens to elect their own judges, and to direct the administration of [64] the internal affairs of the city, and of its property, which was called *proprios*, and was generally ample.

The term Fuero, which frequently occurs both in the ancient and modern legislation of Spain, has various significations, which ought to be understood in order to avoid confusion. In its most general acceptation, the word Fuero means a law, a code, and in this sense we say Fuero Juzgo, Fuero Real,

<sup>1.</sup> Zarate, Vol. 1, p. 37.

&c. 2. It is applied to the general usages and customs of a province, &c., and in this sense it is used in the phrases, ir contra fuero, quebrantar el fuero, which means to violate received customs. 3. Grants of privileges and immunities, as conceder fueros, to grant exemptions. 4. Charters granted cities or towns, also designated by the term cartas pueblas. 5. Acts of donation made to individuals, churches, or convents on certain conditions. 6. Declarations of magistrates in relation to taxation, fines, &c. 7. Charters granted by the sovereign, or those having authority from him, establishing the franchises of towns, cities, &c., and in this acceptation it is synonymous with Fuero Municipal. It has, moreover, other significations, and is applied to the place where justice is administered, to the peculiar forum before which a party is amenable, as well as to the jurisdiction of the tribunal which is entitled to take cognizance of a cause. This latter distinction it is important to understand, because no country has so many special or privileged tribunals as Spain. Among these, we need only advert to the fuero eclesiastico, fuero militar, fuero de marina, fuero de hacienda, fuero academico, or escolastico, fuero de casa real, fuero de correos, fuero de comercio, fuero de [65] mineria, &c., or the ecclesiastical, military, naval, fiscal, academical &c., forum.

As has already been said, the *Fuero Juzgo* must be considered as the general code of Christian Spain, during the dominion of the Arabs in that country.

But from the confusion incident to the conquest, and various other causes, among which, the small number of this code then extant, had, no doubt, some influence, its provisions were not always either understood or followed, although several cities are known to have received it as their charter. The increasing power of the aristocracy, and the necessity of defining their prerogatives, led to the publication of the *Fuero Viejo*, about the year 992, intended more particularly to effect this object.<sup>1</sup>

# The Fuero Viejo.

Is divided into five books, which contain the ancient usages and general customs of the nation.

BOOK 1. Treats of the king's prerogatives, the rights of his vassals, rules of single combat, law relating to the tenants and dependants of the nobility, and the penalties for vexing or harrassing them, &c.

Book 2. Treats of penal laws.

BOOK 3. Of the mode of administering justice, of evidence, judgments, debts and security, &c.

Book 4. Speaks of contracts, of the manner of [66] acquiring property, of public works, and the construction of mills, &c.

Book 5. Treats of successions, partitions, tutors,

<sup>1.</sup> Perez y Lopez, "Teatro de la Legislacion Universal de Espana é Indias." Vol. 1, Introd. p. 4.

disinheritance, legitimate and illegitimate children, &c.1

This work, much less comprehensive than the Fuero Juzgo, has become obsolete, and is now never cited in the forum, except in tracing the origin of some legal enactment, or in support of some ancient custom, or historical fact.

In the interval between its publication and that of the Fuero Real, two events occurred which had a marked influence on the science of the laws throughout Europe. One of these was the public lectures on the Roman law, given by Irnerius, at the university of Bologna, whence a taste for similar studies was widely disseminated. The other was the formation of the Decretals of Gratian, about the year 1151, and those of Raymond de Penafort, by order of Pope Gregory IX., in 1236.

The human mind which, till then, appears either to have been slumbering in inactivity, or engaged in efforts to secure some physical advantage, was suddenly aroused to intellectual exertion; and it engaged in this new pursuit with all the energy and enthusiasm which characterize youth, and pursued it with the steady perseverance which never fails to ensure success.

The Roman jurisprudence, rendered accessible by Irnerius and his disciples, soon became the favorite study in almost every part of Europe, and chairs

<sup>1.</sup> The best edition of the Fuero Viejo is that published by Asso and Manuel at Madrid, 1771.

and [67] public academies were everywhere erected in aid of its propagation.

The extraordinary zeal manifested for the study of the Roman law, at this period, must be ascribed in part, no doubt, to the intrinsic excellence of its precepts; but probably still more to the want of other intellectual pursuits, affording suitable employment for the mind, which, like the body, craves and is invigorated by exertion.

The Roman law, which soon became known in Spain, exercised there a marked influence on its subsequent legislation. Ferdinand III., after he had expelled the Moors from the greater portion of Spain, contemplated the introduction of a new legislation, which his premature death alone prevented him from carrying into execution. His son, Alphonso the Learned, (El Sabie,) followed in the footsteps of his father, and in the year 1255 promulgated the Fuero Real, which was only intended as a precursor of the larger and more comprehensive code, known as the Siete Partidas, published eight years afterwards. (1263.)

### The Fuero Real

Which bears the same relation to the *Partidas* as the Institutes of Justinian to the Pandects,<sup>1</sup> is di-

<sup>1.</sup> See the opinion of *Don Gregorio Mayans y Syscar*, in the Introduction to the Institutes of Doctor Joseph Berni, *Perez y Lopez*, Introd. p. 20.

vided into four books, containing seventy-two titles and five hundred and forty-nine laws.

[68] Book 1. Treats of the holy Catholic religion; of the alienation of ecclesiastical property, and of various public offices, and the duties thereto annexed.

Book 2. Treats of the modes of administering justice, of evidence, judgments, appeals, &c.

Book 3. Treats of marriage, matrimonial gains, partitions, legacies, fidei commissa, successions, tutorships, and matters relating thereto and in conclusion explains the nature of different sorts of contracts.

Book 4. Treats of apostates, Jews, Saracens and their slaves, of crimes and punishments, of adoption, emancipation, interments, pilgrims and navigation.

The preceding imperfect analysis shows sufficiently the want of method, and the imperfection of the arrangement of this code, intended rather as a guide to the magistrate in the administration of the law, than as a full and exact exposition of the jurisprudence of the country.

The latter was the province of the *Partidas*, which, as has already been said, appeared in 1263, although they do not appear to have been authoritatively promulgated as the law of the land until 1348, in the reign of Alphonso XI.

This code, one of the most remarkable monuments of legislation of the middle ages, and which the Spaniards regard with the highest veneration, and as a model both of style, method and precept,<sup>1</sup> it behoves us [69] to examine with more care, since its pages embody the substance of the actual jurisprudence of Spain.

#### The Siete Partidas

Are divided, as the title indicates, into seven parts. Each *partida* begins with one of the letters of the name of Alfonso, as may be seen from the following extracts:

A servicio de Dios, &c.

L a fé Catolica, &c.

F izo nuestro Señor Dios, &c.

O nras señaladas &c.

N acen entre los homes &c.

S esudamente digeron &c.

O lvidanza et atrevimiento, &c.

a quaint method adopted to record the name of the author, not unusual at this period.

## The First Partida

Contains twenty-four titles; the first of which treats of the nature, origin and object of laws; the second speaks of usages and customs; and the remaining

<sup>1. &</sup>quot;Codigo a la verdad excelente á todos respectos, y que acasa no tendrá igual en Europa," says Perez y Lopez. In speaking of the Partidas, Marina praises "su bello sistema y admirable método en lo cual acaso se aventaja á todos los modernos codigos de la Europa." "Juicio Critico, p. 30. This was written after the appearance of the Napoleon Code.

twenty-two of religion, and matters thereto appertaining.

This is regarded as the most imperfect of all the partidas; and the Spanish writers, with hardly an exception, condemn its tendency, and the exorbitant powers therein granted to the pope and the clergy. It is little else than a digest of the canon law, which Alfonso, it is said, introduced into Spain in order to [70] obtain the support of the pope to his pretensions to the imperial throne of Germany, which he was then soliciting.<sup>1</sup>

### The Second Partida

Is divided into thirty-one titles, of which the first eleven treat of the prerogatives of the crown, and the duties of the monarch towards God, his family, his officers, and his subjects.

The nine following prescribe the duties of the people towards the sovereign. The next eight treat of the rights, duties and prerogatives of the military; the two following of captives and their redemption; and the last title treats of public education, of the sciences, of the professors teaching them, their salaries, &c.

He has left behind him various works, which attest this fact, and the epithet of Wise applied to him proceeds from the erroneous translation of the word *Sabio*, which in Spanish signifies both learned and wise, Hist. d'Esp. par La Vallée. Vol. 1, p. 321.

<sup>1.</sup> Alfonso el Sabio, erroneously surnamed the Wise, to which title he has not the smallest pretensions, since his whole conduct displayed a signal want of prudence, and his incapacity to appreciate his true position, and to avail himself of its advantages, was the most learned monarch of his age.

Although this partida contains many useless and prolix dissertations, it abounds also in views that are liberal and wise, and deserve to be studied at the present time. It is certainly one of the best, if not the very best of the seven composing the code.

#### The Third Partida

Is subdivided into thirty-two titles. The first of these treats of justice, and the advantages resulting to a nation from its proper administration.

[71] The twenty-seven following treat of judicial proceedings, nature of evidence, the duties, attributes and responsibilities of judges, of lawyers, attorneys, notaries together with the forms of public acts, &c.

The five following treat of prescription, possession, servitudes, denunciation of new works, &c.

This partida is copied almost exclusively from the Roman law, and, on that account, has been objected to by the Spanish jurists, who admit, however, that the mode of administering justice which it establishes is much more precise and methodical than the system previously in force.

## The Fourth Partida.

This partida, like all the rest, is preceded by a prologue, in which the reasons are assigned for treating of the subjects it contains.

It is divided into twenty-seven titles, nineteen of which treat of marriage and the relations it creates, &c. The seven following treat of liberty and slavery, of feudal lords and their vassals; and the last title is a dissertation on friendship.

The last title, which is merely a philosophical dissertation, in imitation of Cicero, has evidently no connection with the subject of legislation, and should have been omitted. In relation to the other subjects treated of, the doctrines are derived partly from the canon and partly from the Roman law, as well as from the treatise "de feudis." The Spanish legal writers regard it as the most imperfect next to the first partida.<sup>1</sup>

# [72] The Fifth Partida.

Contains fifteen titles, which treat of obligations, and contracts, such as loans, deposit, sales, exchange, &c. and also of merchants, partnerships, security, mortgages, &c.

Most of the laws which it contains are copied *verbatim* from the Roman law, and it must be considered as one of the most complete, methodical and elaborate treatises embodied in this collection.

### The Sixth Partida

Contains nineteen titles, the first fifteen of which treat of last wills and codicils, of heirs, acceptance of successions, testamentary executors, intestate successions and partitions. The four remaining titles treat of minors, tutorship, curatorship and restitution in integrum.

The dispositions of this partida, like those of the preceding, are borrowed from the Roman law, and

<sup>1.</sup> Zarate, Vol. 1, p. 180.

though in general just and equitable, they are said not to be in harmony with the institutions of the country.

Those relating to tutorships, curatorships and restitution in integrum, are not liable to the same objections, and are considered as the best portion of this part of the code.

### The Seventh Partida.

This, which is the last, is divided in thirty-four titles. Of these, the first thirty-two treat of crimes and punishments, &c., and the two remaining explain the signification of words and the general rules of law.

This partida is also considered as very defective, abounding, not only in erroneous views of the object and aim of the penal law, but exhibiting numerous omissions, and leaving crimes unpunished which were [73] of frequent occurrence. Yet, although it inflicts capital punishments much too frequently, and contains too many offences punished with infamy and confiscation of property, it is upon the whole more benignant and just in its enactments than the criminal codes in existence in other countries during the same period.

Of this code various opinions have been formed, both in Spain and elsewhere, diametrically opposed to each other. Spanish writers generally can hardly find language sufficiently strong to express their admiration of this production, which they regard as one of the loftiest and most successful efforts at legislation which any country can exhibit. Others show less enthusiasm and more judgment, by admitting that, though commendable for its style, and a highly creditable effort at legislation, considering the age, it is not exempt from many and grave errors, and that to hold it up as a model for imitation in the present age is preposterous.<sup>1</sup>

[74] The Partidas, although published in 1263, were not promulgated, or generally adopted as the law of Spain, until the reign of Alonzo XI. in 1348, when they were sanctioned by the Cortes held at Alcalá de Henares, after, as it is alleged, they had been revised and amended. They were subsequently ratified by the Cortes at Burgos, in the reign of Henry II., in 1367, and by Juan II. in 1380, in the Cortes of Soria; and finally by Juan II. in the Cortes held at Toro in 1505. As this law of Toro was incorporated in the Nueva Recopilacion, and thence transferred to

<sup>1.</sup> Don Nicolas Antonio calls it "Cuerpo completisimo de toda la jurisprudencia española, tanto sagrada como profana; publica y privada; civil y criminal." Don José Vargas styles it "el inmortal codigo, el mas metodico, el mas completo de cuantos se conocen, \* \* \* colmado de una erudicion asombrosa, con una pureza de lenguaje que no se hablo mejor en dos siglos, &c." Sempere, with more justice, says "si las Partidas se hubieran de considerar solo como una obra literaria, apenas se encontrará otra de igual mérito en la epoca en que se escribió aunque si se examina á las luces de la buena critica, no dejan de encontrarse tambien en ella defectos muy notables. Las infinitas etimologias superfluas y la mas de ellas ridiciones y descripciones inexactas, y mas oscuras que las cosas definidas, las citas no necesarias; las frecuentes contradiciones en la confusa mezcla de tantas legislaciones, eclesiastica, profana, foral, feudal, y real, son defectos que se encuentrun encada paso &c., y que rebajan mucho su merito, &c." (p. 276.)

the Novisima Recopilacion, it follows that they have, at the present time, as high authority as that assigned them by Alonzo XI.

This celebrated code was printed for the first time in the reign of Ferdinand and Isabella, and since that time it has had sixteen editions, of which that published at Madrid in 1807, by the Royal Academy, is considered the most correct, although the large edition in four volumes folio, published in Madrid in 1787, with the notes of Gregorio Lopez, is the most esteemed, and the most usually consulted.

Before the final promulgation of the Partidas, that is, during the reign of Ferdinand IV., in 1310, were published.

# The Leyes de Estilo.

These laws, two hundred and fifty-two in number, treat of the mode of conducting suits, prosecuting them to judgments and entering appeals; some of them also treat of contracts and last wills and testaments. They may be considered as a code of practice, adopted by the tribunals of the period, and they are usually published as an appendix to the Fuero Real.

[75] About the middle of the fourteenth century, the legislation of Spain consisted of the Fuero Juzgo, various Fueros Municipales, the Fuero Real, Leyes de Estilo, and the Partidas. But as between the first appearance of the Partidas in 1263, and their final sanction in 1348, many laws have been published, the Cortes, held at Alcalá de Henares in

the last named year, caused these laws to be collected and promulgated, and hence

The Ordenamiento de Alcalá,

Which is divided into thirty-two titles, each containing various laws in relation to the mode of conducting suits, contracts, last wills, crimes and punishments, &c.

Such was the legislation of this period, at the end of which the jurisprudence of Spain, though rich in materials from which a proper system of laws might easily have been made, exhibited a mass of legislative enactments, often confused and contradictory, from which it was extremely difficult to extract the laws actually in force, or applicable to the controversies pending in the tribunals.

#### CHAPTER V.

## FOURTH PERIOD.

Spain after the Expulsion of the Arabs.

During the preceding period, Christian Spain had finally succeeded, after long and laborious efforts in [76] shaking off the Mohammedan yoke, and in expelling or subduing her invaders. In the progress of this protracted struggle a marked revolution had taken place both in the manners and the laws. The former had assumed much of the feudal character. which distinguished Europe during that age, while the latter, remodelled in conformity to the principles of the Roman and canon laws, had become incomparably more complex. The Fuero Juzgo still remained the law of the land, but many of its enactments had become obsolete, others had been repealed, and a new legislation, often obscure, and not always consistent, had arisen on the ruins of that of the Visigoths.

In the reign of Ferdinand and Isabella, the laws were, in consequence, in such a state of confusion as to afford efficient protection neither to the life nor the property of the citizen, and reform was loudly demanded from all quarters. The monarchs, sensible of the necessity of reforming the legislation of the country, made several efforts to effect it, all of which were unsuccessful.<sup>1</sup>

Some changes were, however, introduced, and certain laws enacted, among which the *Ordenamiento* of *Montalvo*, and the *Leyes de Toro*, deserve more especial notice.

Las Ordenanzas Reales, Ordenamiento Real, or Ordenamiento de Montalvo, is a compilation made by [77] order of Ferdinand and Isabella, by Don Alfonso Diaz de Montalvo, about the year 1484.

It contains the most important dispositions of the Fuero Real, Leyes de Estilo, Ordenamiento de Alcalá, royal edicts and ordinances, subsequent to the publication of the Partidas. It is divided into eight books, each containing various laws, and is preceded by a prologue.

It is far from being a complete digest even of the materials it undertook to arrange; and shortly after its appearance, the Cortes of Valladolid and other

<sup>1.</sup> For an account of the state of the jurisprudence of Spain during this period, see Prescott's "Ferdinand and Isabella," Vol. 1, p. 196, &c., and Vol. 3, p. 447, &c., Also Sempere "Historia de Derecho Espanol." Book 4, chap. 1. Zarate, "Analysis &c. Vol. 2 tit 10

sis, &c., Vol. 2, tit. 10.

1. This is the date assigned it by Marina. Asso y Manuel say 1492, "Ensayo Ho. Crit." by Marina, Vol. 2, p. 181. Perez y Lopez say 1496. Introd. p. 26. There has been much controversy as to the authority of this compilation, which Espinosa, de Paz, de Mesa, Father Buriel and Doctors Asso and Manuel regard as a private enterprise of Montalvo. Marina has, however, shown very satisfactorily that this is an error, and that Montalvo not only composed it by order of his sovereigns, but that it was published by their authority at Huete, and he gives the original of the royal order to that effect. "Ensayo," Vol. 2, p. 181, note 2.

portions of the kingdom prayed that a more complete compilation of the laws might be undertaken.

In consequence of these requests, the Cortes assembled at Toledo in 1502, undertook a revision of the laws, which produced eighty-three new laws, afterwards published in the Cortes of Toro in 1505, whence they derive their name of

Leyes de Toro,

which have acquired very great celebrity.

These laws treat of a great variety of subjects including both the penal and civil law; but the most remarkable portion treats of *Mayorazgos*, which owe [78] their origin in a great measure to this legislation, and, in the sequel, caused great injury to the country.

These laws were all subsequently incorporated in the *Nueva Recopilacion*, and thence transferred to the *Novisima Recopilacion*. They have given rise to numerous commentaries, among which those of Gomez are the most esteemed.

In the meantime, Spain, formerly divided into numerous petty kingdoms, frequently warring against each other, and always liable to come in collision, had become an extensive, flourishing and powerful kingdom, wisely and firmly governed by its joint sovereigns. The discovery of the new world, and the conquests there made by the Spaniards, tended greatly to increase this power, and rendered Spain, unquestionably, the first power in Europe. Macaulaey, in speaking of Philip II., remarks, "It

is no exaggeration to say, that during several years, his power over Europe was greater than even that of Napoleon."

This change in the condition of the country rendered its relations to other countries so complicated, and required so constant and assiduous attention on the part of the monarchs to the internal administration of their extensive possessions, that few, if any, attempts were made to reorganize or to remodel its ancient legislation.

[79] Charles V. was more of a German than a Spaniard in feeling, and it is certain that Spain owes him little thanks for the care bestowed on her interests during his long and otherwise not inglorious reign.

His son and successor, Philip II., was, on the contrary, too exclusively attached to Spain, and this circumstance obtained for this able, but unamiable monarch, a pardon for many an act by which he sacrificed the true interests of his country.

Indefatigable in his labors to consolidate his power, nothing escaped his attention which he thought conducive to this end, and the reform of the legis-

<sup>1.</sup> In his review of the "History of the Succession in Spain," by Lord Mahon, Edinb. Rev., 1833, where he very satisfactorily sustains his position. This review is an admirable exposition of the condition of Spain prior to this war, although we are not disposed to admit that the causes of the decline of that country have been either fully or fairly investigated by the reviewer.

<sup>1.</sup> For an able and very interesting review of the character, policy and conduct of Philip II, see "Ha. Gen. de Esp." by Lafuente, Vol. 1, "Discurso Preliminar," §12, p. 147, &c.

lation became early an object of his solicitude. But in Spain, reforms of this nature have ever been slow in their progress, and it was not till the year 1567, that for the first time appeared

The Nueva Recopilation.

This code, which includes all the laws which had not already been superseded in the Ordenamiento de Alcalá, Ordenamiento Real, and Leyes de Toro, together with such other laws as had been enacted since their publication, is divided into nine books. Of these,

Book 1. Treats of the holy Catholic faith, ecclesiastical affairs, the patronage of the king, the cruzada, &c.

Book 2. Treats of laws, the functions of the various magistrates, the royal council, &c.

[80] Book 3. Prescribes the duties of various tribunals, as the Audiencias, duties of Corregidores, Alcaldes, jurisdiction of the tribunal of commerce of Bilbao, Council of the Mesta, physicians, apothecaries, &c.

Book 4. Contains in the first title the rules for maintaining the royal jurisdiction, and in the following titles it treats of the ancient jurisdiction, mode of asserting rights in the courts of justice; of dilatory and peremptory exceptions and witnesses. It treats also of the mode of conducting suits in the first instance and on appeals; of the duties of Alguaziles of the court and chanceries, &c.

Book 5. Treats of betrothings and marriages; of heirs and successions; and of different species of contracts. It concludes with some laws relative to mints and their officers.

Book 6. Treats of caballeros and hijosdalgo; of behetrias; of castles and fortifications; of the Cortes and the procurators of the king; ambassadors, duties and taxes, gold and silver mines, exemption from taxation and rearing of horses, &c.

Book 7. Prescribes the rules for the government of the *Ayuntamientos*, the preservation of municipal franchises, of the property belonging to cities and towns. Besides these subjects it contains various titles treating of subjects entirely disconnected as ships and other vessels, workmen, dress, manufacture of cloth, tallow-chandlers, &c.

Book 8. Is a collection of the penal law, imposing among other penalties, that of death for fighting a duel, &c. It treats also of pardons.

[81] Book 9. Treats of matters relating to the royal revenue, its officers, alcabalás, fraud on the revenues, fairs, almoxarifazgo, &c.

From the year 1567 until the year 1805, when the Novisima Recopilacion was promulgated, few

<sup>1.</sup> Alcabalá, a duty of a certain per cent paid to the treasury on the sale or exchange of property. It is said to be a corruption of the words al que vala, [that which has value.] Escriche, Vo. "Alcabalá."

<sup>2.</sup> Almoxarifazgo is a general term, signifying both export and import duties, as well as excise. The word is derived from the Arabic, and is said to signify the same as portorium in latin, [port dues.] Escriche, Vo. "Almoxarifazgo."

changes of importance occurred in the legislation of Spain. New edicts, cedulas, ordenamientos, pragmaticas, &c., were published from time to time, and formed a suplement to the Recopilacion, under the name of Autos Acordados. The necessity of reforming the laws of the country had been long felt, and their confusion had been often deplored, until Charles IV. at last confided the task of compiling the laws actually in force to Don Juan de la Reguera Valdelomar, who, in the short space of two years, composed the

## Novisima Recopilacion.

This compilation is divided into twelve books, of which we shall give a brief analysis.

Book 1. Contains thirty titles, treating of the holy Catholic religion, churches, holy brotherhoods, cemeteries, interments, and, in general, of all matters appertaining to the church and to ecclesiastical affairs.

Book 2. Is divided into fifteen titles, which treat of the ecclesiastical jurisdiction, of the inquisition and its officers, of the tribunal of the three military orders, [82] and in general of all matters appertaining to the ecclesiastical tribunals.

Book 3. Is subdivided into twenty-two titles, treating of the succession of the crown, of laws, of the provincial *fueros*, of royal decrees, cedulas, orders, and *pragmaticas*, of royal grants, favors and privileges, of the Council of State, of the Cortes and procurators of the kingdom, of ambassadors, royal

domain, and in general of all matters connected with the sovereign, his rights and prerogatives, and those of the members of his court, &c.

Book 4. Divided into thirty titles, treats of the courts and their competency; and especially of the council and chamber of Castille, and all matters thereto appertaining.

Book 5. Contains thirty-four titles treating of the chanceries of Valladolid and Granada, of the Audiencias of Galicia, Asturias, Seville, the Canary Islands, Estremadura, Arragon, Valencia, Catalonia and Mayorca, their officers and their duties, and of matters thereto appertaining.

Book 6. Contains twenty-two titles treating of the subjects of the kingdom, grandees of Spain, the nobility and *hijosdalyo*, and their privileges; of knights, of the military, their *fuero* and privileges, military tribunals, of the navy, its privileges, tribunals, &c.; of the supreme council of *Hacienda*, (finance) of foreigners visiting and domiciliated in the country, of taxation, &c.

Book 7. Contains forty titles, which treat of fortifications; of the councils, ayuntamientos, and ordinances of towns, of the election of town officers, of the corregidores, alcaldes mayores of cities, of notaries [83] public, of the commons of cities, and town dues, (proprios y arbitrios) of the peopling of towns, distribution of their vacant lands, of public roads and bridges, of hospitals, public health, and other matters of police.

Book 8. Is divided into twenty-six titles, which treat of primary education, the study of the latin language, and of the humanities; of seminaries, colleges, the university of Salamanca, its jurisdiction, professors, &c.; of the study of medicine and surgery, and matters thereto appertaining; of the press, publication of books, &c., of societies for the encouragement of industry; of music, painting and sculpture and their professors; of the manufactures of the kingdom, their privileges, &c.

Book 9. Is divided into twenty titles, which treat of the superior tribunal of commerce, of money, mines, of terrestrial and maritime consulates; of exchange, public banks, merchants, traders and their contracts; brokers, ships, merchandise, weights and measures, standards of gold and silver; goods, the importation of which is prohibited; the exportation of the products of the country, &c.

Book 10. Divided into twenty-four titles, treats of contracts and obligations in general; of betrothings, marriage, dower, donations propter nuptias, community of acquests and gains, disposable portion, donations, loans &c. of mayorazgos and other entails, of last wills, executors, inventories, &c.; of vacant estates, the use of stamped paper, &c.

Book 11. Divided into thirty-five titles, treats of judges, their prerogatives, rights of suitors, pleadings, practice, exceptions, prescription, &c., appeals, costs, [84] and in general, of all matters prescribed by law for conducting suits through the tribunals, until finally decided.

Book 12. Divided into forty-two titles, treats in general of all matters connected with the criminal law and the mode of administering criminal justice, which we deem it unnecessary to analyze.

From the foregoing brief survey of the contents of the *Novisima Recopilacion*, it is apparent that it was intended as a political, administrative, civil and criminal code, in which the elements of civil law, properly so called, enters in very small proportion. A portion of Book 10 appears to have been allotted exclusively to this subject, and even there it is not very accurately treated.

As a methodical and accurate exposition of the legislation it embodies, this code is not deserving of great praise, and both its arrangement and its contents have been very severely criticised by Marina in his "Juicio Critico de la Novisima Recopilacion," in which he undertakes to prove that the system adopted is defective, contains anacronisms, erroneous citations, antiquated and contradictory laws, some laws that are repealed commingled with laws in force and laws abrogated; that laws have been omitted, &c. All of which he has very clearly proved, although after making all allowances for the errors and defects which he [85] points out, it does still remain one of the most valuable and comprehensive codes extant.

<sup>1.</sup> Published at Madrid, in 1820, in reply to an accusation of Valdelomar, taxing Marina with having calumniated the author and his compilation, and as a justification of his criticism on the labors of the compiler.

We have thus passed in review the jurisprudence of Spain from the earliest times to the present period, and it only remains for us to give a brief history of the colonial legislation of that country, in order to complete the outline we have attempted. But ere we proceed to this undertaking, it will be proper to pause a moment and to review the periods we have already sketched, in order to ascertain the result.

#### RECAPITULATION.

In summing up the result of our preceding investigations, it will be found,

- 1. That during the First Period, which is also the earliest of which we have any reliable information, the Roman law governed the peninsula, which was in fact a province of the Roman empire. This period, which comprises a space of about six centuries, if counted from the close of the second punic war, until the conquest of the Visigoths, we have not thought it necessary to examine very minutely, because the government of Rome and its laws are generally known, and may be studied in authors to which all have access.
- 2. That during the Second Period, the laws of the Visigoths supplanted those of Rome, but that this change was gradual, inasmuch as the conquerors and the conquered were for a long time governed by their own peculiar legislation. We also find, that

it was not till after the conversion of Reccarede, and when the [86] whole nation was united in one faith, and subject to the same sovereign, that the Roman and Visgothic laws coalesced, and the Fuero Juzgo became the general law of the land. By analyzing this code, we discover that it is infinitely more rational, mild and philosophical than all other attempts at legislation of the same period, and that it contains provisions which retain their force and efficacy even at this day.

This period includes a space of about three centuries, reckoning from the beginning of the reign of  $\Delta$ thaulf, in 415, to the battle of *Xeres de la Frontera*, in 710.

3. During the Third Period, the Visigothic empire is subjugated by the Arabs, and more than ninetenths of the inhabitants of Spain yield to their dominion. The conquered nation still retains it ancient laws, although subject to the Moslem sway, while the few who have escaped the conquest seek refuge in the mountains of Asturia, and there occupy themselves in reconstructing a new empire. The latter carry with them their own laws and institutions, which continue to prevail until modified by the force of circumstances.

Various small States are formed, and the feudal laws are introduced to a greater or less extent. The Christians encroach more and more on the territory of the Arabs, and create municipalities, whose franchises are recognized and sanctioned by Fueros. The power of Castille finally becomes predominant and its monarchs promulgate general codes, among which the Fuero Viejo was more particularly designed to define and sanction the prerogatives of the nobility. [87] Alfonso IX prepares a general code, as an introduction to which he causes the Fuero Real to be published. This general code, known as the Siete Partidas, does not become the law of the land till nearly a century after its first appearance, when it is solemnly promulgated by Alfonso XI. The latter monarch also publishes the Ordenamiento de Alcalá, intended more especially to regulate the form of judicial proceedings.

In consequence of the great number of fueros and codes published during this period, the jurisprudence of Spain becomes exceedingly complicated, and the desire of reform is general, though none is effected.

All these changes in the legislation of Spain occupy nearly eight centuries, viz. from the battle of *Xeres* in 710, to the conquest of Granada in 1492.

4. The Fourth and Last Period occupies about three centuries and a half.

Arragon and Castille are united, and the Arabs and Moors subdued. The whole peninsula acknowledges the dominion of the Christians, and is divided into two kingdoms, Spain and Portugal. Of these, Spain is incomparably the most important and powerful, and Portugal is conquered and annexed to it by Philip II.

Ferdinand and Isabella attempt to introduce some order into the system of legislation, but the Ordena-

miento Real and the Leyes de Toro, published by them for this purpose, instead of producing this effect, tend rather to increase the confusion.

In the reign of Philip II, the Nueva Recopilacion, intended as a general code, is at last promulgated, and furnishes some guide to the general law of the kingdom, although it is far from being satisfactory. From [88] its publication, in 1567, unto the year 1805, when the Novisima Recopilacion made its appearance, the Nueva received from time to time modifications by royal decrees, &c., which were published as a supplement to it under the title of Autos Acordados.

The Novisima Recopilacion is little else than a republication of the Nueva and the Autos Acordados, with some few additions, omissions, and changes of phraseology.

One remarkable feature in the legislation of Spain should not be overlooked, to wit, that at no time was any attempt made, upon the promulgation of a new code, to abrogate the old one. Hence, all the different codes of Spain must be examined in order to determine the law on any given subject. This rule, however, is to be understood with this restriction, that the latest in point of time is first in authority. It is also to be observed that the Fuero Viejo has been so modified and changed by subsequent enactments, that it can no longer be consulted for any useful purpose. All that remains useful in the Ordenamiento Real and Leyes de Toro has been incorporated into the Nueva, and finally in the Novisima

Recopilacion. The general legislation of Spain is therefore to be found, at this time, 1st, in the Fuero Juzgo; 2d. in the Fuero Real; 3d. in the Siete Partidas; and 4th. in the Novisima Recopilacion.

In consulting these, there is no difficulty as to the authority of the *Recopilacion*, which is the latest, as well as the highest authority. But when the *Recopilacion* is silent, there exists some diversity of opinion as to which of the remaining codes ought to prevail. [89] Some authors giving the preference to the *Partidas*, others to the *Fuero Juzgo*, or the *Fuero Real*.<sup>1</sup>

From the foregoing outline of the history of the Spanish law, it is apparent, that the difficulty of mastering its provisions arises from three distinct sources, viz:

- 1. From the number of its codes.
- 2. From the conflict of their provisions, and
- 3. From the perplexity, often inevitable, of determining in cases of conflict which of the opposing enactments is entitled to authority.

This latter difficulty, however, can only arise in relation to the provisions of the Fuero Juzgo, Fuero Real, and the Siete Partidas, and as the cases in which they occur are rare, no serious inconvenience

<sup>1.</sup> Castro. "Discursos Criticos sobre las Leyes y sus interpretes." B. 2, Discurso 3.

Sempere 517. Zarate, Vol. 1, p. 22, quotes a royal cedula of the 15 July, 1788, which gives the Fuero Juzgo preference over the Partidas; it declares, "que la ley de Fuero Juzgo no estaba derogada, y que debian los oidores conformarse a ella, y no tener a las Partidas el respeto y adhesion que se traslucia en su consulta."

results from it. As the Fuero Real was only intended as an introduction to the Partidas, they must be interpreted as laws in pari materia, and are entitled to equal weight, unless in direct conflict, when the most recent in point of time prevails. When the Fuero Juzgo conflicts with the Fuero Real, or the Partidas, on the contrary, the first mentioned, as already shown, is held to be the best authority, unless some provisions of the Nueva, or Novisima Recopilacion should have modified the particular law relied on.

[90] No country of modern Europe can furnish so rich and so complete a collection of laws as Spain, and from the materials thus accumulated, during the lapse of centuries, there can be no doubt that, without looking to any other source, a code may be formed superior to any yet enacted elsewhere.

We understand that such an undertaking is now progressing, and from the specimen furnished of the capacity of the Spanish jurists to do it justice, as evinced in the "Codigo de Comercio," no doubt can be entertained, that, when completed, it will be a work of consummate ability.

#### CHAPTER VI.

# COLONIAL LEGISLATION OF SPAIN,

AND MORE ESPECIALLY OF

## MEXICO.

After Spain had taken possession of her colonies in America, she found it indispensable to establish some form of administration and government by which she would be able to preserve their dependence, and render them useful to the mother country. Her own institutions and laws were ill adapted for this purpose, and it would have been vain, at that period, to look for models elsewhere. consequently compelled to devise new laws and regulations, which, without deviating too far from those which governed her at home, should still conform to the new exigencies and wants of the remote and extensive regions she had acquired in the west. Unfortunately for Spain, neither the science of politics, nor political economy, was well understood at the time when she acquired and attempted to regulate her vast acquisitions in the new world. The errors she committed were consequently grave, but they are in great part attributable to the imperfect [92] knowledge of the science of government at the time, and it is extremely doubtful whether any other nation, under the same circumstances, could have acted with greater prudence or

discernment. Spain regarded her colonies as so many fiefs dependant on the crown, governed by her monarchs as they thought their own interest and that of the mother country required. The kings of Spain evidently regarded the colonies as their own private estates, from which they were desirous to derive the greatest possible revenue, and it never entered their imagination to consider the colonists in any other light than as their tenants. Such appears to have been the views prevailing throughout Europe, not only at this time, but for centuries afterwards, when the pretensions of the colonists to be treated as citizens of the mother country, and entitled to the same privileges, were looked upon as preposterous.

Spain, acting on this principle, governed her possessions in America by agents appointed by her sovereign, who had full power to remove them whenever he thought proper. Concessions of land were made to such persons as he permitted to settle in the country; but no one was authorized to establish himself there without his special permission. All intercourse with any other country but Spain was strictly prohibited, and no foreigners obtained access to the Spanish colonies. The very mode in which the soil should be tilled was prescribed, and the cultivation of many productions of the mother country were forbidden under severe penalties. In short, the colonies were regarded as a royal monopoly, the administration of which belonged exclusively to the monarch.

[93] The extraordinary fertility of the country, and its immense mineral wealth, tempted adventurers from every part of Spain to settle the American continent and the adjacent islands, and new and flourishing colonies were consequently formed, which required the aid and became the appendages of the Spanish monarchy. To govern colonies so vastly superior in extent to the mother country, and to prescribe laws suited to their situation, and calculated to advance their prosperity, was no easy task, and owing to the imperfect knowledge possessed of the wants of the colonists and the resources of the country, was necessarily imperfectly performed.

The laws, enacted in Spain for the government of the colonies, were forwarded thither in the form of cedulas, decretos, resoluciones, ordenamientos, reglamentos, autos acordados, and pragmaticas.<sup>1</sup>

These different orders and decrees became in the course of time so numerous, that as early as the reign of Philip II, the Spanish authorities were often perplexed to ascertain what laws were actually in force [94] in the colonies. To remedy this, that

<sup>1.</sup> Autos Acordados and Cedulas were orders emanating from some superior tribunal, promulgated in the name, and by the authority of the sovereign.

Decretos were similar orders in ecclesiastical matters.

Ordenamientos and Pragmaticas were also orders emanating from the king, and differing from Cedulas only in form, and in the mode of promulgation.

Reglamentos were written instructions given by a competent authority without the observance of any peculiar form.

Resoluciones were opinions formed by some superior authority on matters referred to its decision, and forwarded to the inferior authorities for their instruction and government.

monarch ordered a collection to be made of all the colonial laws; which undertaking, progressing with characteristic slowness, was not accomplished till the 18th of May, 1680, in the reign of Charles II, when the "Recopilacion de leyes de los Reinos de las Indias," commonly called Recopilacion de Indias, was finally promulgated.

The method adopted in this code is the same as that pursued in the Nueva Recopilacion of the laws of Spain. It is divided into nine books, comprising two hundred and eighteen titles, which contain six thousand four hundred and forty-seven different legal enactments, all of which, derived from the orders, decrees and regulations of different sovereigns, and often temporary in their character, are dignified with the title of laws. Hence, there is found united in this compilation many laws on the same subject, in which the preceding law is only repeated, others in which it is modified, and still others in which it is abrogated, either in whole or in part. The veneration of the compilers for laws which once had received the royal sanction seems to have been so great, that they did not consider themselves at liberty to omit them. This mode of proceeding has swelled this code to its present dimensions, when, if a more rational method had been adopted, it could readily have been compressed into one-third of the space it actually occupies.

The Recopilacion de Indias, notwithstanding its dimensions, is a mere digest of the royal orders, &c., issued from time to time for the better government

of the American colonies. It appears exclusively intend- [95] ed to regulate the political, military and fiscal administration of the Spanish possessions in the new world. Hence, this code, so far from being entitled to be regarded as a complete code for the government of Spanish America, must be considered as a mere enumeration of exceptions to the general and common law of Spain. You look in vain among its numerous provisions for a single title treating of the civil law, or indeed for any law which has not exclusive reference to the mode of administering the various departments of the government of the country. It is on this very account that laws 1 and 2, title 1 of book 2, provide, that in cases where the Recopilacion de Indias has no provision on the subject, the laws of Castille must be observed.1

Thus the civil law of Spain became likewise that of America; but inasmuch as the condition and wants of the colonies varied in many respects from that of the mother country, Philip IV., by a law, found in the *Pecopilacion de Indias*, (l. 40, t. 1,

<sup>1.</sup> Law 1, after declaring the effect of the Recopilacion de Indias, says "y en lo que no estuviere decidido por las leyes de esta Recopilacion para las decisiones de las causas y su determinacion, se guarden las leyes de la Recopilacion y Partidas de estos Reynos de Castilla, conforme a la ley siguiente." Law 2 provides, "Ordenamos y mandamos que en todos los casos, negocios y pleytos en que no estuviere decidido, ni declarado lo que se debe proveer por las leyes de esta Recopilacion, ó por Cedulas, Provisiones ú Ordonanzas dadas, y no revocadas para las Indias, y las que por nuestra orden se despacharon, se guarden las leyes de nuestro Reyno de Castilla, conforme á la de Toro, asi en cuanto a la substancia, resolucion y decision de los casos, negocios y pleytos, como a la forma y orden de substanciar."

b. 2,) decreed, that no law enacted for Spain should be obligatory in Ameri- [96] ca unless accompanied by a cedula to that effect emanating from the Council of the Indies. Hence many legal enactments in force in Spain were never extended to the American colonies, while several others of no efficacy at home, were promulgated exclusively for Spanish America. Besides this source of legislation, the Audiencias, or supreme tribunals, of Mexico and Peru, &c., published from time to time rules and regulations, which, although their authority was questionable, were, as well as orders emanating from the viceroy, held to be obligatory. The latter species of laws, known as Autos Acordados and Providencias de Gobierno have been collected as far as they concern Mexico. This collection, which begins with the year 1528 and terminates in 1786, was published in Mexico in 1787, and is the work of Montemayor and Beleña, both judges of the Audiencia of Mexico.

The different changes, gradually introduced in the colonial law, rendered a revision of the *Recopilacion de Indias* indispensable, and it was accordingly ordered about the year 1777. This undertaking was, however, never completed, and it was abandoned after one book had been finished. This portion of the new colonial code was published and sanctioned by an order dated at Aranjuez, 25th March, 1792. It has reference exclusively to the Council of the Indies, and if it be fair to judge from this specimen of the character of the whole, there is little reason to regret that the rest was not completed.

Partial changes were, however, made in the laws of the colonies, which deserve attention. Among these, the *Ordenanza de Mineria*, approved on the 22d May, [97] 1782, and the *Ordenanza de Intendentes*, sanctioned by a royal decree of the 4th December, 1786, occupy a conspicuous place.

Both of these are special codes, treating, the former of the mode of opening mines and conducting mining operations, and the latter changing the political divisions of Mexico, and defining the powers of its different authorities.

As a general rule, the Recopilacion de Indias is regarded as the only authentic collection of the ordinances and decrees governing Spanish America prior to the year 1680. For a knowledge of the laws and regulations subsequent to this period, we are indebted to the labors of a Mexican judge, (oidor,) Don Eusebio Ventura Beleña. The title of this work, published at Mexico in two volumes folio in 1787, is "Recopilacion Sumaria de todos los Autos Acordados de la Real Audiencia y Sala del Crimen de esta Nueva España, y providencias de su Superior Gobierno," &c.

Beleña did not confine himself to the giving mere extracts of the laws published since the appearance of the Recopilacion de Indias; but published these laws at length. He also republished all the cedulas and decrees promulgated from 1528 to 1677, which had been previously collected by Montemayor, by order of the viceroys of Mexico, to which he added

all such further orders and decrees as had appeared from 1677 to 1680.

As this work, however, is but the publication of a private individual, its provisions are of no authority, unless the authenticity of the law, on which the author relies, has been duly verified. It is proper to remark, [98] that this collection has been often verified, and that in Mexico, nay, throughout the Spanish colonies, it is constantly quoted, and relied on as unquestionable authority.

In the meantime Spain, as has already been explained, caused a new collection to be made of its laws, the *Novisima Recopilacion*. The royal cedula, which sanctioned its publication, did not declare that it should be in force in America, yet, as it embodies nearly all the provisions of the *Nueva Recopilacion*, declared binding by the laws of the Indies, its authority is unquestionable.

The revolution of Spain, which followed the French invasion, gave rise to a new form of government under the direction of the *Cortes*, whose decrees were held obligatory in Mexico, whenever they had been either expressly declared to apply to that country, or had been promulgated therein.

After the reestablishment of the absolute monarchy in Spain in 1814, the sovereigns of that country continued to enact laws for the government of America, until 1820, when a representative government was again established.

The decrees of the Cortes of Spain have been

collected and published by order of the Mexican government, as a portion of their own legislation.<sup>1</sup>

Such was the legislation of Spain in force in Mexico on the 16th September, 1821, when she declared herself independent. Since that period, the Mexican [99] Republic has adopted various forms of government although in the main republican. Such, however, has been the state of confusion, and so numerous have been the revolutions of that interesting country, that it has been unable to bestow much attention on the reform of its legislation.

The civil law of that country, with some few exceptions, noted hereafter, is, in point of fact, hardly dissimilar from that of Spain.

The laws, orders and decrees emanating from the Mexican Congress, from the 28th September, 1821, until the end of December, 1830, have been published, by authority, in five volumes small quarto. The title of this collection is, "Collection de Ordenes y Decretos por la Soberana Junta Provisional Gubernativa, y Soberanos Congresos Generales de la nacion Mexicana. Segunda edicion corregida y aumentada por una comision de la Camara de Diputados." Mexico, 1829-1831. The laws enacted during the years 1831 and 1832, were also published officially, under the title, "Coleccion de Leyes y Decretos expedidos por el Congreso General de los Estados

<sup>1.</sup> It is entitled "Coleccion de los Decretos y Ordenes de las Cortes de España, que se reputan vigentes en la Republica de los Estados Mexicanos." Mexico, 1829.

Unidos Mexicanos en los años 1831 y 1832." Mexico, 1833.

The laws of the years 1833, 1834, 1835, 1836 and 1837 were published in 1838 by Don Basilio José Arrillaga, under the supervision of a committee appointed by Congress for that purpose. Mr. Arrallaga has also been engaged for several years in publishing, by order of the Mexican Government, a work entitled "Recopilacion de leyes, bandos, reglamentos, circulares y disposiciones que forman regla general de los Supremos poderes y otras Autoridades de la Repub- [100] lica Mejicana;" intended to comprise, as the title imports, all laws of a permanent nature, from the year 1793 to the present time.

In relation to this collection of Arillagas, it is to be observed, that the obligatory force of the laws it contains depends on the authority whence they emanated, and the extent of its powers. Supposing this authority equal in every respect, the general rule, that a posterior repeals a prior law, is necessarily applicable.

Considering the order in which the laws of the Mexican Republic are to be consulted, and are held obligatory, the following rules will serve as a guide, viz:

- 1. The general laws of the Republic, promulgated in due form, since the 28th Sept., 1821.
- The decrees of the Cortes of Spain, applicable to America, published from 1820 to the 23d. Sept., 1821.

- The cedulas forwarded by the Council of the Indies from the month of May, 1814 to the year 1820.
- 4. The decrees of the Cortes of Spain, from the 24th Sept., 1810, to the month of May, 1814, which have been promulgated in New Spain.
- 5. The cedulas sent to the Indies, inserted in the Novisima Recopilacion, and those officially communicated by the Council of the Indies, from the 9th of May, 1680, to the 24th Sept., 1810.
  - 6. The Recopilacion de Indias.
  - 7. The Nueva Recopilacion.
  - 8. The Fuero Real and the Fuero Juzgo.
  - 9. The Siete Partidas, and
- 10. And lastly, the *Novisima Recopilacion*, on those subjects not provided for in the preceding codes, it being regarded as a supplement to them in cases omitted.

[101] The preceding codes and collection of laws present no difficulties as to the manner in which they are quoted, as will be seen by the explanation of the abbreviations at the beginning of this volume.

In relation to the *Recopilacion* of *Montemayor* and *Beleña*, it is to be observed, that it is divided into three parts, each indicated by a different paging. The first contains the *Autos Acordados* of the *Audiencia* of Mexico, from 1528 to 1677, one hundred pages folio. The second, the ordinances and decrees of the superior government during the same period, one hundred and fourteen pages folio. Both of these

are due to the labors of *Montemayor*. The third part, which is the production of *Beleña*, contains, 1st. The *Autos Acordados* of the same *Audiencia*, from 1677 to 1786. 2d. Those of the *Sala de Crimen* during the same period. And 3d. The decrees of the superior government during the same period.

From the preceding brief outline of the Laws of Spain and its colonies it appears, that their legislation is embodied in printed codes, which from their vast extent, and the difficulty of ascertaining how much of the old laws have been modified, amended or repealed by subsequent enactments, renders it often embarrassing to determine the legislation on any given subject. In the civil law, which accompanies this historical sketch, we have endeavored to remove this difficulty, and to present, in a condensed and intelligible form, the civil jurisprudence of Spain and Mexico. That, notwithstanding every precaution, it does not contain some errors, can hardly be expected, but they will be found few in number, and by the authorities to which we refer, they can easily be corrected.

[102] We have subjoined a list of the different Codes of Spain, with an account of the number of books, titles and laws they contain, to enable our readers to judge of the mass of the Spanish legislation.

Year.	Title.	Books.	Titles.	Laws.	Vols.
693.	Fuero Juzgo,	12	55	560	1
992.	Fuero Viejo,	5	33	229	1
1255.	Fuero Real,	4	72	549	2
1263.	Siete Partidas,	7	182	2479	4

4046 T		-		
1310. Leyes de Estilo,	66	"	252	1
1348. Ordenamiento de Alcalá,	66	32	125	1
1490. Ordenamiento Real,	8	115	1133	2
1567. Nueva Recopilacion,	9	214	3391	2
1745. Autos Acordados,	9	110	1134	2
1805. Novisima Recopilacion,	12	330	4036	4
1680. Recopilacion de Indias,	9	218	6447	3

89 1543 20,335 23

It is moreover to be recollected, that many of the foregoing laws contain a great variety of distinct provisions, so that the various legal enactments embodied in the preceding legislation exceeds probably (100,000) one hundred thousand.

## CHAPTER IV.

Rights and duties of Husband and Wife in relation to the property acquired during marriage.

## Section 1.

## Community of Goods.

Art. 43. The law recognizes a partnership between the husband and wife as to the property acquired during marriage, and which exists until expressly renounced, in the manner prescribed in Section 3.50

Art. 44. To this community belong

[13] 1. All the property of whatever nature which the spouses acquire by their own labor and industry,1

2. The fruits and income of the individual property of the husband and wife.2

3. Whatever the husband does gain by the exercise of a profession or office, e. g. as judge, lawyer, physician, &c.3

4. The gains from the money of spouses, although the capital is the separate property of one of them.

Art. 45. The property owned by either husband or wife before marriage does not belong to the community,4 nor the profits of the same, already due, although collected after the marriage.

<sup>5.</sup> Ib. laws 57 and 59.

See also Escriche. Bienes gananciales. Fuero Real, l. 1, T. 3, B. 3.

<sup>1.</sup> Nov. Recop. l. 5, T. 4, B. 10. 2.

<sup>3.</sup> Ib. l. 5, T. 4, B. 10.

Fuero Real, 1. 3, T. 3, B. 3.

Art. 46. Property acquired by either after marriage by a gratuitous title, such as inheritance, donation, or bequest, does not belong to the community.1

Art. 47. Nor does property acquired in exchange for other property belonging to one of them, nor that acquired by the produce of the sale of property belonging exclusively to one of the spouses.2

Art. 48. Money, expended in improving property belonging to one of the spouses, belongs to the community, but gives the other no claims to the property itself.3

Art. 49. Husband and wife are entitled to an equal share in the community, although one of them should, [14] at the time of marriage, have been without any means.4 At the same time both are liable, in equal proportion, for the losses and debts incurred during its existence.

Art. 50. Deteriorations of the private property of one of the spouses, without the fault of the husband, are considered as losses, and debts of the community are

- 1. Money borrowed by the husband.
- 2. Rents and taxes to which the property of one of the spouses is liable.
- 3. The dower promised by husband and wife during marriage, or by the husband alone. See Arts. 347, 348.

Ib. l. 1 and 2, T. 3, B. 3. Nov. Recop. l. 5, T. 4, B. 10. Fuero Real, l. 11, T. 4, B.

Partid l. 49, T. 5, P. 5.
 Nov. Recop. l. 3, T. 3, B. 3.

#### Section 2.

Of the administration of the community property.

Art. 51. The husband alone administers the property of the conjugal partnership, during the existence of the marriage, and he can sell and dispose of the same as he thinks proper, provided always he does so without the intention of injuring his wife.<sup>1</sup>

Art. 52. This power, however, must be exercised in the lifetime of the husband, and gives him no power of control over the community property, not his own, by last will and testament.<sup>2</sup>

Art. 53. On this account, a legacy left by the husband to his wife does not diminish the share of the latter in the matrimonial gains.<sup>3</sup>

Art. 54. The community is also responsible for do-[15] nations made by the husband, if the same be moderate and bestowed on relations.

Art. 55. The husband is liable for deteriorations, which happen, through his fault, to the property of his wife.<sup>5</sup>

## Section 3.

Of the dissolution and renunciation of the matrimonial community.

Art. 56. The community is dissolved

- 1. By the death of one of the spouses.
- 2. By the confiscation of the property of one of them.

<sup>1.</sup> Ib. l. 5, T. 4, B. 10 and 205th law of Estilo.

<sup>2.</sup> Ib.

<sup>3. 16</sup>th Law of Toro.

<sup>4.</sup> Goros., No. 54. 5. Ib. No. 55.

3. By the separation from bed and board.

Art. 57. The dissolution by death takes effect from the moment of its occurrence, although the heirs of the deceased spouse continue to live with the survivor.<sup>1</sup>

Art. 58. But, though in such a case the community has ceased to exist, a new one may be created between said heirs and the survivor, if they continue to keep their property in common, but, in such event, the gains or losses are apportioned among each, in proportion to his share, as established in Arts. 728, 729.

Art. 59. Confiscation dissolves the community from [16] the moment the decree becomes executary, but such decree does in no manner affect the share belonging to the other partner.<sup>2</sup>

Art. 60. Separation from bed and board dissolves the community, when it is decreed by the competent tribunal, as required by Art. 33.

Art. 61. When the community is dissolved for any of the foregoing causes, either party has the right to proceed to the immediate settlement of the same.\*

Art. 62. Fruits pending at the time of such dissolution are to be equally divided, with this distinction; that if they proceed from vines or trees, the

<sup>1.</sup> Goros, No. 57.

MEXICAN LAW.

The provision in §2, Art. 56, is not applicable in Mexico, where confiscation of property is abolished by the 179th article De las Bases de organizacion politica of the 12th June, 1843.

 <sup>77</sup>th Law of Toro.
 Goros, No. 61.

fruits must have appeared, because, in the contrary event, the owner owes one half of the expense incurred for their production, but if they be from land that is sowed, the produce is equally divided, although the fruits should not appear at the time of the dissolution.<sup>1</sup>

If the land has been worked without being sowed he to whose share it falls is only liable for one half of the expense.<sup>2</sup>

Art. 63. All property possessed by husband and wife is presumed to belong to the community, and is to be divided equally, unless it be proved that a portion of the same is the individual property of one of them.<sup>8</sup>

Art. 64. The wife may renounce the community, and by the renunciation she forfeits all claims to the [17] gains, and remains discharged from all the debts contracted, or losses sustained by her husband.<sup>4</sup>

Art. 65. The wife may renounce the community before, during, and after the dissolution of the marriage.

Art. 66. This renunciation must be express, and is never presumed.

# Section 4.

Rights over the community property, of the surviving spouse.

Art. 67. On the death of the wife, the surviving

<sup>1.</sup> Ib. No. 62.

<sup>2.</sup> Fuero Real, l. 10, T. 4, B. 3.

 <sup>203</sup>d Law of Estilo. Nov. Recop. l. 4, T. 4, B. 10.
 60th Law of Toro.

husband acquires the absolute ownership, and full administration of one half of the matrimonial gains, and can freely dispose of the same, as well by contract inter vivos, as by testament, without being compelled to reserve any portion thereof for the children of the marriage.1 provided he does not deprive them of their lawful portion.

Art. 68. The wife loses her matrimonial gains in the following cases:

- 1. When she has been guilty of adultery.2
- 2. When she has abandoned the husband without his consent.8
- 3. When she has joined some religious sect, and therein married, or committed adultery.4

The widow likewise forfeits her portion Art. 69. of the matrimonial gains by leading a dissolute life.5

<sup>14</sup>th Law of Toro.

Partid, l. 15, T. 17, P. 7. Fuero Real, l. 5, T. 5, B. 4. Partid l. 6, T. 25, P. 7. Nov. Recop. l. 5, T. 4, B. 10.

# APPENDIX II.

# NOVÍSIMA

# **RECOPILACION**

DE LAS LEYES DE ESPAÑA,

MANDADA FORMAR

POR EL SEÑOR DON CÁRLOS IV.

# LIBRO X. TITULO IV.

# TITULO IV.

DE LOS BIENES GANANCIALES, O ADQUIRIDOS EN EL MATRIMONIO.

#### LEY I.

Ley 1, tit. 3. lib. 3. del Fuero Real.

Modo de partir entre marido y muger los bienes adquiridos en el matrimonio.

Toda cosa que el marido y muger ganaren ó compraren, estando de consuno, háyanlo ambos por medio; y si fuere donadío de Rey ó de otri, y lo diese á ambos, háyanlo marido y muger; y si lo diere al uno, háyalo solo aquel á quien lo diere. (ley 2. tit. 9, lib. 5. R.)

# LAW I.\*

Fuero Real Law 1, tit. 3, lib. 3.

Mode of dividing between husband and wife the property acquired during marriage.

Everything the husband and wife may earn or purchase during union, let them both have it by halves; and if it is a gift of the King or other person, and given to both, let husband and wife have it; and if he give it to one, let that one alone have it to whom it may have been given. (R. Law 2, tit. 9, lib. 5.)

<sup>\*</sup>The translations of these laws were taken from Packard v. Arrellanes, 17 Cal. 531.

#### LEY II.

Ley 2. tit. 3. lib. 3. del Fuero Real.

Bienes comunes á marido y muger, y los pertenecientes á cada uno por sí.

Si el marido alguna cosa ganare de herencia de padre ó de madre, ó de otro propinquo, ó de donadio de señor, ó de pariente ó de amigo, ó en la hueste del Rey, ó de otro que vaya por su soldada, háyalo todo quanto ganare por suyo; y si fuere en hueste sin soldada, á costa de sí y de su muger, quanto ganare desta guisa, todo sea del marido y de la muger, ca asi como la costa es comunal de ambos, lo que dicho es de suso de las ganancias de los maridos, eso mismo sea de las mugeres. (ley 3. tit. 9. lib. 5. R.)

# LAW II.

Fuero Real Law 2, tit. 3, lib. 3.

Property common to husband and wife, and that belonging to each one for himself.

If the husband should earn anything by inheritance from father or mother, or other near relative, or by gift from lord, relation or friend, or in the army of the King, or of another in his pay, let him have everything he may earn for himself; and if he be in the army without pay, at the expense of himself and his wife, whatever he may earn in this way, be it all the husband's and wife's; for even as the cost is common to both, let what they may earn in

that way be common to both. What above is said of the earnings of husbands, let the same be as regards those of wives. (R. Law 3, tit. 9, lib. 5.)

#### LEY III.

Ley 3. tit. 3. lib. 3. del Fuero Real.

Los frutos de los bienes propias del marido ó de la muger sean comunes.

Magüer que el marido haya mas que la muger, ó la muger mas que el marido, quier en heredad quier en mueble, los frutos sean comunes de ambos á dos; y la heredad, y las otras cosas do vienen los frutos, háyalas el marido ó la muger cuyas ántes eran, ó sus herederos. (ley 4. tit. 9. lib. 5. R.)

## LAW III.

Fuero Real Law 3, tit. 3, lib. 3.

Let the fruits of the separate property of the husband or of the wife be common.

Although the husband may have more than the wife, or the wife more than the husband, in real estate or in personal, let the fruits be common to both; and let the realty or other things whence the fruits proceed go to the husband or wife who owned them before, or the heirs of him or her. (R. Law 4, tit. 9, lib. 5.)

#### LEY IV.

Ley 203. del Estilo; y D Felipe II. año de 1566.

Los bienes que tengan el marido y muger se presuman comunes, no probando su respectiva pertenencia.

Como quier que el Derecho diga, que todas las cosas que han marido y muger, que todas se presumen ser del marido, hasta que la muger muestre que son suyas; pero la costumbre guardada es en contrario, que los bienes que han marido y muger, que son de ambos por medío, salvo los que probare cada uno que son suyos apartadamente; y ansi mandamos, que se guarde por ley. (ley 1. tit. 9. lib. 5. R.)

## LAW IV.

Law 203 of Estilo and Philip II, the year 1566.

Let the property which husband and wife have be presumed common, its respective ownership not being proved.

Albeit that the law may say, that all things which husband and wife have are all presumed to belong to the husband, until the wife shows that they belong to her; nevertheless, the custom observed is on the contrary, that the property which husband and wife have belong to both by halves, except that which each one may prove to be his separately; and so we order that it be observed as a law. (R. Law 1, tit. 9, lib. 5.)

#### LEY V.

D. Enrique IV. en Nieva año de 1473 pet. 25.

Bienes comunes, y los pertenecientes á marido ó muger, en declaración de las precedentes leyes del Fuere y Estilo.

Declarando las leyes del Fuero, y lo contenido en el Libro del Estilo de Corté, y las otras leyes que disponen sobre la manera que se ha de tener en los bienes ganados entre el marido y la muger durante el matrimonio, mando y ordeno, que todos y qualesquier bienes castrenses, y oficios del Rey, y donadios de los que fueron ganados, y mejorados y habidos durante el matrimonio entre el marido y muger por el uno dellos, que sean y finquen de aquel que los hubo ganado, sin que el otro haya parte dellos, segun lo quieren las dichas leyes del Fuero; pero los frutos y rentas dellos, y de todos otros qualesquier oficios, aunque sean de los que el Derecho hubo por casi castrenses, y los otros bienes que fueron ganados ó mejorados durante el matrimonio, y los frutos y rentas de los tales bienes castrenses y oficios y donadios, que ambos los hayan de consuno. Y otrosí, que los bienes que fueren ganados, mejorados y multiplicados durante el matrimonio entre el marido y la muger, que no fueren castrenses ni casi castrenses, que los pueda enagenar el marido durante el matrimonio, si quisiere, sin licencia ni otorgamiento de su muger, y que el contrato de enagenamiento vala, salvo si fuere probado que si hizo cautelosamente por defraudar ó damnificar á la muger. Y otrosí mando y ordeno, que si la muger fincare viuda, y siendo viuda, viviere luxuriosamente, que pierda los bienes que hobo por razon de su mitad de los bienes que fueron ganados y mejorados por su marido y por ella, durante el matrimonio entre ellos, y sean vueltos los tales bienes á los herederos de su marido difunto en cuya compañia fueron ganados. (ley 5. tit. 9. lib. 5. R.)

#### LAW V.

Don Enrique IV, at Nieva, the year 1473, pet. 25.

Of common property and that belonging to the husband and wife, in declaration of the former laws of the Fuero and Estilo.

Declaring (maintaining) the laws of the Fuero and what is contained in the book of Estilo de Corte, and the other laws which govern the method which is to be had touching property earned between husband and wife during marriage, I order and ordain that all and any property resulting from military service, (bienes castrenses) royal offices, and gifts that shall have been earned, and improved, and held during the marriage between the husband and wife by one of them, be and remain the property of the one that may have earned the same without the other having any part thereof as required by the said laws of Fuero; but that the

fruits and income of the same and every other office whatever, although of the class which the law has considered as semi-military, (casi castrenses) and the other property that have been earned or improved during marriage, and the fruits and income of such military property, offices, and gifts belonging to both in common. And likewise, that the property earned, improved, and multiplied during the marriage between husband and wife, not being military or semimilitary, may be alienated by the husband during the marriage, if he will without license or conveyance of his wife, and that the contract of alienation be valid, save it be proven that it was done fraudulently, to defraud or injure the wife. And likewise, I order and ordain, that if the wife remain a widow, and being a widow, live lustfully, she shall lose the property which she got by reason of her half of the property that was earned and improved by her husband and herself during the marriage between them; and that the said property be returned to the heirs of her deceased husband in whose company they were earned. (Law 5, tit. 9, lib. 5, R.)

# LEY VI.

Ley 14 de Toro.

Facultad del cónyuge que superviva, para disponer de los bienes multiplicados en el matrimonio, sin obligacion á reservarlos para los hijos de él.

Mandamos, que el marido y la muger, suelto el

matrimonio, aunque casen segunda ó tercera vez ó mas, puedan disponer libremente de los bienes multiplicados durante el primero, ó segundo ó tercero matrimonio, aunque haya habido hijos de los tales matrimonios, ó de alguno dellos, durante los quales matrimonios los dichos bienes se multiplicaron, como de los otros sus bienes propios que no hubiesen sido de ganancia, sin ser obligados á reservar á los tales hijos propiedad ni usufruto de los tales bienes. (ley 6. tit. 9. lib. 5. R.)

# LAW VI.\*

Law 14 of Toro.

Power of the surviving consort to dispose of the property multiplied during marriage, without necessity of reserving it for the children of the same.

We order that the husband and the wife, the marriage being dissolved, although they may marry a second or third time, or more times, may dispose freely of the property multiplied during the first, or second, or third marriage, although there may have been children of such marriages, or one of them, during which marriages the said property was multiplied in the same way as of their other property, which was not of earnings, (de ganancia) without being obliged to reserve to such children the ownership nor the usufruct of the said property. (R. Law 6, tit. 9, lib. 5.)

<sup>\*</sup>The expression reservar, translated herein by reserve, has a technical meaning which the English does not convey.

# LEY VII.

Ley 15 de Toro.

Casos en que los padres que pasan á segundo matrimonio, deben reservar á los hijos del primero la propiedad de los bienes del difunto.

En todos los casos que las mugeres, casando segunda vez, son obligadas á reservar á los hijos del primer matrimonio la propiedad de lo que hubieren del primer marido, ó heredaren de los hijos del primer matrimonio, en los mismos casos el varon que casare segunda ó tercera vez, sea obligado á reservar la propiedad de ello á los hijos del primer matrimonio; de manera que lo establecido cerca desta caso en las mugeres que casaren segunda vez, haya lugar en los varones que pasaren á segundo ó tercero matrimonio. (ley 4. tit. 1. lib. 5. R.)

# LAW VII.

Law 15 of Toro.

Cases in which parents who contract a second marriage must reserve† to the children of the first the ownership of the property of the deceased.

In all cases where the women who contract a second marriage are obliged to reserve to the children of the first marriage the ownership of what they get from the first husband, or inherit from the children of the first marriage, in the

<sup>†</sup>The original word reservar has a peculiar meaning which, to be understood, requires a study of the Spanish doctrine of bienes reservables. See Feb. 2, 93.

same cases let the man who may marry a second or third time be obliged to reserve the ownership of the same to the children of the first marriage; so that the rule established touching this case for women who marry again, shall apply to the man who contracts a second or third marriage. (R. L. 4, tit. 1, lib. 5.)

#### LEY VIII.

Ley 16 de Toro.

Los bienes mandados por el marido á la muger, no se comprehendan en la mitad que ha de haber en los gananciales.

Si el marido mandare alguna cosa á su muger al tiempo de su muerte ó testamento, no se le cuente en la parte que la muger ha de haber de los bienes multiplicados durante el matrimonio, mas haya la dicha mitad de bienes, y la tal manda en lo que de Derecho debiere valer. (ley 7. tit. 9. lib. 5. R.)

# LAW VIII.

Law 16 of Toro.

The property bequeathed by the husband to the wife is not comprised in the half she is to get of the gananciales.

If the husband bequeath anything to his wife at the time of his death or will, let it not be counted in the part which the wife is to get of the property multiplied during the marriage; but let her have such half of the property and the bequest at its lawful value. (R. Law 7, tit. 9, lib. 5.)

# LEY IX.

Ley 60 de Toro.

La muger, renunciando las ganancias, no paque las deudas hechas por el marido durante el matrimonio.

Quando la muger renunciare las ganancias, no sea obligado á pagar parte alguna de las deudas que el marido hubiere hecho durante el matrimonio. (ley 9. tit. 9. lib. 5. R.)

# LAW IX.

Law 60 of Toro

Let the wife, renouncing the profits, (ganancias) not have to pay the debts contracted by the husband during the marriage.

When the wife renounces the profits, (ganancias) let her not be obliged to pay any part of the debts which the husband should have made during the marriage. (R. Law 9, tit. 9, lib. 5.)

# LEY X.

Ley 77 de Toro.

Ninguno de los cónyuges, por delito del otro, pierda los bienes multiplicados hasta la sentencia declaratoria.

Por el delito que el marido ó la muger cometiere, aunque sea de heregía, ó de otra qualquier qualidad, no pierda el uno por el delito del otro sus bienes, ni la mitad de las ganancias habidas durante el matrimonio: y mandamos, que sean habidos por bienes de ganancia todo lo multiplicado durante el matrimonio, hasta que por el tal delito los bienes de qualquier dellos sean declarados por sentencia, aunque el delito sea de tal calidad que imponga la pena ipso jure. (ley 10. tit. 9. lib. 5. R.)

# LAW X.

#### Law 77 of Toro.

Neither of the consorts for the crime of the other shall lose the property increased, until the declaratory sentence.

On account of the crime which the husband or the wife may commit, though it may be heresy, or of any other nature, let not the one, by reason of the other's crime, lose his own property, nor the half of the earnings got during the marriage; and we order that all the increase during the marriage be held as bienes de ganancia, until for such crime the property of either of them be declared (specified?) by sentence, and this although the crime be of nature that imposes the penalty ipso jure. (R. Law 10, tit. 9, lib. 5.)

#### LEY XI.

Ley 78 de Toro.

La muger casada pueda perder por delito los gananciales, y demas bienes que la pertenezcan.

La muger, durante el matrimonio, por delito pueda perder en parte ó en todo sus bienes dotales ó de ganancia, ó de otra qualquier qualidad que sean. (ley 11. tit. 9. lib. 5. R.)

## LAW XI.

Law 78 of Toro.

The wife may lose, by reason of crime, the gananciales and other property that belongs to her.

The wife, during the marriage, may, by reason of crime, lose in part or in whole her dowry and earnings, or other property, of whatever nature it may be. (R. Law 11, tit. 9, lib. 5.)

# LEY XII.

D. Cárlos III. por resol. á cons. de 15 de Sept., y cél. del Consejo de 20 de Dic. de 1778.

Observancia del fuero del Baylío, en quanto á sujetar á particion, como gananciales, los bienes llevados ó adquiridos en el matrimonio.

Apruebo la observancia del fuero denominado del Baylío, concedido á la villa de Alburquerque por Alfonso Tellez, su fundador, yerno de Sancho II., Rey de Portugal, conforme al qual todos los bienes que los casados llevan al matrimonio, ó adquieren por qualquiera razon, se comunican y sujetan á particion como gananciales: y mando, que todos los Tribunales de estos mis Reynos se arreglen á él para la decision

de los pleytos que sobre particiones ocurran en la citada villa de Alburquerque, ciudad de Xerez de los Caballeros, y demas pueblos donde se ha observado hasta ahora; entendiéndose sin perjuicio de providenciar en adelante otra cosa, si la necesidad ó transcurso del tiempo acreditase ser mas conveniente que lo que hoy se observa en razon del citado fuero, si lo representasen los pueblos.

# LAW XII.

Observance of the law of Baylio in regard to subjecting to partition, as ganancials, the properties taken or acquired in the marriage.

I approve the observance of the law called Baylio, granted to the village of Albuquerque by Alfonso Tellez, its founder, son-in-law of Sancho II, King of Portugal, according to which all of the properties which the married acquire by any means, be communicated and subjected to partition, as ganancials; and I order that all the Tribunals of these my Kingdoms be governed thereby for the decision of the suits which may occur regarding partition in the said Village of Albuquerque, city of Xerez de los Caballeros, and other pueblos where it has been observed until now; this being understood to be without prejudice to prescribing in future otherwise, if the need or passing of time should evidence it to be more convenient than what is now observed by reason of said law, if it be represented by the pueblos.

#### LEY XIII.

D. Cárlos IV. por resol. á cons. de 17 de Abril, y provis. de 16 de Junio de 1801 para Córdoba, y circ. del Consejo de 6 de Marzo de 802.

Derogacion de la ley ó costumbre, prohibitiva de que los mugeres Cordobesas, participen de los gananciales adquiridos durante el matrimonio.

Abolimos en quanto sea necesario la supuesta ley, costumbre ó estilo que ha gobernado hasta ahora en la ciudad de Córdoba, de que las mugeres casadas no tengan parte en los bienes gananciales adquiridos durante el matrimonio. En su consequencia queremos y mandamos, que la ley general de la participacion de las ganancias en los matrimonios sea extensiva á las mugeres Cordobesas de todo aquel Reyno, segun y como se practica con las de Castilla y Leon. Y en esta conformidad mandamos al Corregidor de la expresada ciudad de Córdoba, á los Alcades mayores de ella, y demas á quienes corresponda, observen, guarden y cumplan la citada resolucion de nuestra Real persona, haciéndola observar, guardar y cumplir en todo y por todo, segun y como en ella se contiene: y á fin de que esta Real resolucion tenga puntual observancia en todo el Reyno, se comunique á las Chancillerías, Audiencias, Corregidores y Justicias de él. (1)

<sup>(1)</sup> Por Real resolucion á cons. del Consejo de 17 de Diciembre de 1803, comunicada por circular de 14 de Abril de 804, con motivo de representacion hecha, manifestando las dudas y pleytos que podian suscitarse sobre la inteligencia de lo dispuesto en esta Real provision, teniendo, S. M. presente no ser derogatoria de alguna ley, fuero 6 costumbre racional anterior, sino declaratoria de un derecho de que solo han estado privadas las mugeres Cordobesas por una supuesta costumbre, 6 mas bien pernicioso abuso; se sirvió declarar, que comprehende, no solo los matrimonios contraidos despues de 28 de Mayo de 801, en que se publicó la Real determinacion en el Consejo, sino tambien todos los celebrados ántes de aquel dia, y que subsistian en él; pero con exclusion de los que se hubiesen disuelto ántes de aquella época.

#### LAW XIII.

Derogation of the law of custom, prohibitive of the Cordoba women to participate of the ganancials acquired during the marriage.

We abolish in what may be necessary the supposed law, custom or style which has governed until now in the city of Cordoba, that the married women have no part in the ganancial properties acquired during the marriage. And consequently we desire and order, that the general law of partition of the gains in marriages be extensive to the women of Cordoba of all that Kingdom, according and as it is practiced with those of Castilla and Leon. And in conformity herewith we order the Corregidor of the said city of Cordoba, and the major Alcaldes, thereof and all others concerned, to observe, keep and comply with the said resolution of our Royal Person, and cause the same to be observed, kept and complied with in all and by all, according and as contained therein; and in order that his Royal resolution be punctually observed in all the Kingdom, that it be communicated to the Chanceries, Audiences, Corregidores and Justices thereof.

#### APPENDIX III.

The following is quoted from "Novísima Sala-Mexicana," Vol. I (1870):

(Text.)
Sec. 2a, Titulo IV. De
los efectos civiles del
matrimonio.

El matrimonio produce algunos efectos civiles que vamos á explicar. El primero es el poder que tienen los padres sobre sus hijos, de que hemos hablado en el titulo anterior. El segundo de que se ocupa todo el titulo 9 del libro 5 de la Recopilación, ó sea el 4 del libro 10 de la Novísima. y que no conocio el derecho romano, es la adquisición para amos conjuges por mitad de lo que cada uno ganaré durante el matrimonio; de modo que todos los bienes que tuvieren el marido y la mujer, son de ambos por mitad, menos aquellos que alguno de los dos probaré que le pertenecen separadamente. (Citing L. 1 tit. 9 lib. 5 de la R. ó 4 tit. 4 lib. 10 de la N.) Así es que se presumen comunes, si no se

(Translation.)
Sec. 2a, Title IV. Of
the Civil effects of the
marriage.

1. The marriage produces some legal effects which we proceed to explain. The first is the authority which the parents have over their children, of which we have treated in the preceding The second, which title. is treated of entirely in title 9 of Book 5 of the Recopilación, or title 4 of book 10 of the Novísima, and which was unknown to the Roman law, is the acquisition by both consorts in halves of what each of them gained during the marriage; so that all of the properties which the husband and wife may have, belong to both equally, excepting those which either of the two may prove belongs to him or her separately. Thus they are presumed to be community, if they are not proved otherwise, and

prueba lo contrario, y en ésto se funda la necesidad ó conveniencia de otorgar u n a escritura publica al tiempo de contraer el matrimonio en la que consten los bienes que cada una trae.

Esta es la sociedad ó compañía legal que nace del matrimonio, y durá mientras dura él por beneficio de la ley, que le da algunas diferencias respecto de las Compañías comunes, como verémos. Las palabras "estando de consuno" que usa la ley, (citing L. 2, Tit. 9, lib. 5 de R. 6 1 Tit., 4 lib. 10 de la N.), han sirvido de fundamento para asentar que no existe la compañía sino por la cohabitación de los conjuges, y en apovo se cita la lev 205 del Estilo que hablando del marido, dice, "estando en uno con su mujer," de modo que cesaría la compañía si los conjuges se separasen uno del otro por largo tiempo. Mas Acevedo, Matienzo, Garcia v otros opinan lo contrario, fundados en la frase "durante el matrimonio" de que usa otra lev, explicando las del Fuero v Estilo, pues de

upon this is founded the necessity or convenience of executing a public instrument at the time of contracting marriage in which are set forth the properties which each one brings.

2. This is the society or legal company which is born of the marriage, and lasts while it lasts by benefit of the law, which gives to it some differences as regards the common companies, as we shall see. The words: "estando de consuño" which the law uses (L. 2. tit. 9. book 5. Recop. or L. 1. tit. 4, book 10, Nov.), have served as bases to allege that the company does not exist except by the cohabitation of the consorts. and in support is cited the law 205 of Estilo which speaking of the husbands, says: "being in one with wife;" so that the company would cease if the consorts should separate one from the other for a long time. Further, Acevedo, Matienzo, Garcia and others give the contrary as their opinion. founded on the phase

ella infieren que las palabras "estando de consuno" no deben entenderse rigorosamente. Mas en el caso que la separación fuese por divorcio, juzgan los mismos autores, que el que dio el motivo liberta al otro de la companía, quedando el sin embargo obligado como sucede en la renuncia maliciosa de la compañía comun.

A mas de este caso hay otros dos en que se disuelve la compañia legal sin que se disuelva el matrimomio, y son cuando la mujer renuncia la compañía v cuando se confiscan los bienes de alguno de los dos; pues entonces dura solo hasta la sentencia de confiscación, quedando al inocente libre la mitad de los bienes ganandos hasta aquel dia. La ley condena tambien á perder su mitad á beneficio de los herederos del marido á la viuda que viviere deshonestamente.

"during the marriage" which is used by another law (Law 5, tit. and book cited of the Recop. and of the Novisima), explaining those of the Fuero and Estilo, as they infer therefrom that the words "estando de consuño" should not understood rigorously. Further, in case that the separation should be by divorce, the same authors judge that the one who gave the cause therefor frees the other from the company, leaving him however obligated. happens in the malicious renouncement of the common company. Besides this case there are two others in which the legal company is dissolved without the marriage being dissolved, and they are, when the wife renounces the company, and when the properties of one of the two are confiscated: as then it continues only until the sentence of confiscation, leaving free to the innocent party the half of the properties gained up to that day. The law also condemns the widow who

3. Los interpretes del derecho opinan comunmente que si muerto uno de los conjuges, él que la sobrevive continua viviendo en comunión bienes con los herederos del otro se entiende continuada la compañía legal, pero Matienzo es de opinon contraría fundado en varios: 1a. Que disuelto el matrimonio cesa la razon que introdujo la compañía. 2a. Que siendo esta especial y distinta de las comunes es de rigorosa interpretación v no debe ampliarse. 3a. Que no proviciendo de la convención ó voluntad de los partes, sino de solo á la ley es arriesgado extenderla presumiendola renovada á pretesta de un tacito consentimiento. Porque parece mas acertado decir, que en el caso no se continua la companía legal, sino que se contrae otro de nuevo entre el conjuge viudo y los herederos del otro.

lives dishonestly, to the loss of her half for the benefit of the heirs of the husband.

The interpreters of the law generally opine that if upon the death of one of the consorts, the survivor continues living in communion of properties with the heirs of the other, the legal company is understood to continue, but Matienzo is of the contrary opinion, founded on various reasons: 1st. That the marriage being dissolved, the reason which introduced the company ceases, 2d. That this company being special and distinct from the common companies, should be rigorously interpreted and should not be increased. 3. That not arising from the agreement and will of the parties, but only from the law, it is dangerous to extend it by presuming it to be renewed on the pretext of a tacit consent. Therefore it appears more certain to say, that in this case the legal company does not continue. but that another new one is contracted between the surviving consort and the heirs of the other.

4. No se reputan bienes de la compañía, que comunmente se llaman gananciales, por que tienen los conjuges antes del matrimonio, los cuales quedan propios de aquel de quien eran. Ni las herencias y donaciones que se hicieren á alguno de ellos. Aunque los remuneratorios, si lo son de servicio hecho por los dos, en opinion de Gutierez pertenecen á la compañía; segun Garcia en todo caso, y segun Matienzo en ninguno. Tampoco pertenecen los bienes castrenses ó casicastrenses, si no es que sean ganados á costa de ambos (citing L. L. 2 y 5 tit. 4 lib. 10 de la N.) mas todos las demas que cualquiera de los conjuges adquierre por otro titulo con su trabajo é industria, son de la compañía, y se reputan gananciales (citing 1 tit. 4 lib. 10 de la N.) lo mismo que los frutos y rentas de los bienes y oficios de cada uno de ellos, aunque provengan de los de uno solo; de modo que si á este le dejan una herencia sera de el solo; pero las frutas de ella, serán comunes;

There are not re-4. puted as properties of the company, commonly called gananciales, those which the consorts had before the marriage. which remain the property of the one to whom they belonged, nor the inheritances and donations which may be made to one of them, although the remuneratory, if they are from service rendered by both, in the opinion of Gutierrez, belong to the company; according to Garcia in every case, and according to Matienzo in none. Neither do the properties "castranses or casi castrenses," if they are not gained at the expense of both; but all others which either of the consorts acquire by other title with his or her work and industry, belong to the company, and are reputed gananciales. same as the fruits and rents of the properties and offices of each one of them, even though they arise from those of one only; so that if an inheritance is left to one, it shall belong to that one only; but the fruits thereof shall be common; from

de donde infieren Gutie-Acevedo y otros, que lo que gana el marido como juez, abogado ó medico, es comun y se reputa por gananciales como frutas civiles de estos oficios, que la ley no distinguío cuando establece que lo sean los de cualquiera oficio. Lo son tambien los frutos pendientes al tiempo de disolverse: pero con la distinción de que en los arboles y vinos es menester que hayon aparecido mas no en los sembrados, en los cuales entran los gastos hechos en su beneficio, conforme a una ley, que está recibida en la practica, segun Matienzo y Gomez. Las mejoras ó aumentos de los bienes de cualquiera de ellos si han provenido de la industria ó del trabajo, pertenecen á la compañía; mas no si son obra del tiempo, como si al campo del marido se le hubiese añadado algo por aluvion. Esta doctrina de las mejoras en opinion de Febrero se entiende solo en cuanto á lo gastado en hacerlos y no en cuanto al mayor valor de la finca; y no tiene lugar en los bienes

which Gutierrez, vedo and others infer. that what the husband gains as judge, lawyer or doctor, is common and is reputed to be gananciales, as civil fruits of these offices which the law did not distinguish when it established that the fruits of any office should be so. So also are the fruits pending at the time of the dissolution; but with the distinction that on the trees and vines it is necessary that they shall have appeared, but not the plantings, into which enter the expenses made for the benefit thereof, according to a law of the Fuero real. which is received in practice, according to Matienzo and Gomez. The improvements and increases of the properties of either of them, if they have originated from the industry or work, pertain to the company; but not if they are the work of time, as if to the land of the husband something has been added by alluvion. This doctrine of the improvements, in the opinion of Febrero, is understood only as re-

mayorazgados, pues todos ceden al mayorazgo como verémos. Si uno de los conjuges adquiere algo por derecho de retracto, la cosa sera sola de él: pero el otro tendra derecho á la mitad del precio que costo. Lo mismo debe decirse de la cosa permutada respecto de la cual solo tendrá el otro derecho á la mitad de los guantes vueltas ó ribete si lo hubo. compone alguna cosa con dinero de uno solo la cosa será comun, y el comprador podra sacar su precio del cumulo de gananciales

5. El dominio de los gananciales es comun por mitad al marido y la mujer (citing L. L. 1 y 4 tit. 4 lib. 10 de la N.) sin consideración á si alguno llevo mas bienes que el otro al matrimonio. Macomunión de bienes es en cuanto al dominio y la tienzo opina que esta

gards what is spent in making them, and not as regards the greater value of the land; and has no place in the entailed properties, as all go to the entail as we will see. If one of the consorts acquires something right of retraction, the thing shall belong to that one only; but the other will have right to onehalf of the price which it cost. The same should be said of the thing exchanged, regarding which the other will have right only to the half of the remunerations, returns or rebates if there be any. If anything should be bought with the money of one alone, the thing shall be common, and the purchaser may take its price from the mass of gananciales.

5. The dominion of the gananciales is common equally in halves to the husband and wife, without consideration as to whether one brought more properties than the other into the marriage. Matienzo opines that this communion of properties is as concerns the dominion

posesión: mas Covarrubias v Acevedo dicen que respecto de la mujer debe entenderse de un dominio v posesión habitual v no actual, la cual no le adquiere sino por la disolución del matrimonio, durante el cual es solo del marido; y por eso puede enegenar los bienes de la compañía sin necesidad del consentemiento de la mujer, y es valida la enajenación á menos que sea hecha con animo de defraudarla ó perjudicarla (citing L. 5 tit. and lib. above). Esta circumstancia que exije la ley para que sea invalida la enajenación, ha ser servido de fundamento á Gomez, Gutierez, Garcia y casi todos loes interpretes, para asentar que son validas las enajenaciónes que el marido hiciere sin ese animo, aunque que sea jugando o viviendo vicioamente, contra el sentir de Ayora que opina lo contrario. Tambien se disputa entre los autores si en la facultad de enagenar se incluye la de dar ó donar, afirmandolo Garcia con unos, y negandolo Mati-Molina enzo con otros.

and the possession; but Covarrubias and Acevedo say that as regards the wife it should be understood as an habitual dominion and possession, and not actual, which latter she does not acguire except by the dissolution of the marriage, during the existence of which it is only the husband; and therefore he can convey the properties of the company without necessity of the consent of the wife, and the conveyance is valid, unless it is made with the intention to defraud or injure her. This circumstance which the law requires in that the conveyance may be invalid, has served for foundation to Gomez. Gutierrez. Garcia, and nearly all the interpreters, to affirm that the transfers which the husband may make without that intention are valid. even though it be by gambling or living viciously, against the belief ofAyora, opines the contrary. is also disputed among the authors, if in the power to convey is iny Gutierez llevan una sentencia medio que parece la mas acertada y es que el marido puede hacer donacióes moderadas, no excesivas y sin causa.

cluded that of giving or donating, Gomez affirming with others, Matienzo with others denying. Molina and Gutierrez take $\boldsymbol{a}$ middlecourse, which appears to be the most correct, and is that the husband can makemoderate tions, not excessive and without cause.

6. Mas esta facultad de hacer enagenaciónes debe entenderse limitada á los que se hagan entre vivos, como advierte Acevedo fundado en las mismas palabras de la ley, que dice: "que los pueda enagenar el marido durante el matrimonio," y mas abajo: "y que el contrato de enagenamiento vala." De modo que no puede el marido disponer en Su testamento de las gananciales que pertenecen mujer, la que antes bien entra por la muerte del marido, en la libre administración de la mitad que corresponde, sin obligación de reservar cosa alguna en la propiedad, ni en el usufructo para los hijos que tuviere de matrimonio otro

6. But this power to make conveyances should he understood as limited to those which are made inter vivos, as Acevedo states, based on the same words of the law, which savs: "That the husband can convey them during the marriage" and further down: "and that the contract of convevance shall be valid." So therefore the husband cannot convey in his will the gananciales which pertain to his wife, who rather enters by the death of her husband into the free administration of the half which belongs to her; without obligation to reserve anything whatever in the ownership, nor in the usufruct, for the children which she may have

hubiese contraido antes (citing L. 6 tit. 4, lib. 10 de la N.) y en consecuencia si el marido le hiciere algun legado lo tendrá sin deducción de su mitad.

7. Hemos dicho que la mujer puede renunciar el derecho tengo en la compañía y haciendolo queda obligada á pagar parte alguna de las deudas que el marido hubiere contraido durante matrimonio. Esta nuncia puede verificarse antes de contraer el matrimonio ó despues de disuelto por la muerte: mas si durante el puede hacerse, son varias las opiniones. La mas comun, que defienden Covarrubias, Gomez, Gutierrez, Matienzo y otros. es que tambien puede hacerse entonces, porque además de que la lev habla generalmente usa las palabras "marido y mujer" que solo se dicen con propriedad durante el matrimonio como advierte Acevedo. Gregorio, Lopez y Molina opinan por lo contrario fundados en que están

from another marriage which she may have contracted before; and consequently if the husband should leave her any legacy, she will have the same without deduction from her half.

7. We have stated that the wife can renounce the right which she has in the company, and doing so will not be obliged to pay any part of the debts which the husband may have contracted during the marriage. This renouncement may be made before contracting the marriage or after it is dissolved by the death; but as to whether during the same it can be made. the opinions are various. The most common, which Covarrubias, Gomez, Gutierrez, Matienzo and others defend, is that it can also be done then, because the law besides speaking generally, uses also words "husband and wife," which are only spoken of with propriety during the marriage, as Acevedo states. Gregorio, Lopez and Molina opine the contrary, founded in that the do-

prohibidas las donaciónes entre marido y mujer; mas los que defienden la afirmativa dicen que esta prohibición no se tiende de aquellas donaciónes por la que el donate no se hace mas pobre, aunque el donatario se haga mas rico, como lo expresa la ley, y que esto sucede en el caso, porque no siendo i admisible el dominio que adquiere la mujer, sino revocable, como que depende de la enagenación que puede hacer el marido, renunciorlo es mas bien no adquerir que dar. No obstante esta resquesta, los razones en que se apoya la negativa son tan fuertes, puede decirse que ambos opiniónes son igualmente probables: por lo que ofrecido el caso, lo mas pradente sera resolverlo por la negativa, si por el exámen del hecho resultaré que para otorgar la renuncia hubo seducción, amenaza ó algun otro engaño de parte del marido; y por la afirmativa si no hubo nada de esto.

nations are prohibited husband between wife; but those who defend the affirmative say, that this prohibition is not understood of those donations whereby donor does make himself poorer, even though the donee becomes more rich. as the law expresses, and that this happens in this case, because the dominion which the wife acquires not being inadmissible, but revocable, as it depends on the conveyance which the husband may make, to renounce the same is rather not to acquire than to give. Notwithstanding this answer, the reasons on which the negative is based are so strong, that it may be said that both opinions are equally probable; so that if the case arises, the most prudent thing would be to resolve in the negative. if upon examination of the facts it results that that in order to make the renouncement there was seduction. threats some other deceit on the part of the husband; and for the affirmative if there was nothing of that sort.

.8.

8. In every company, to liquidate the gains, there are deducted the charges or debts, and in the legal company the dowry of the daughters. and the donations propter nupcias to the sons, are reputed as such and should therefore be taken out of the gananciales, whether they are given or promised by both, or by the husband alone. But if the gananciales should not reach, it shall be paid in half from the separate properties both, if promised both, or from those of the husband alone, if he alone promised. This doctrine is extended by Acevedo, Matienzo and Covarriubias to the case in which one of the consort being dead, other makes the promise, the properties being pro indiviso (undivided). based in that these promises are charges against the company; but Gomez of the contrary opinion.

9. Los otros efectos civiles del matrimonio son I. Que ninguna mujer puede sin licencia

9. The other civil effects of the marriage are: I. That no wife can without the license of

de su marido renunciar ninguna herencia, ya le venga por testamento ya por intestado. \* \* \*

her husband, renounce any inheritance, whether the same comes to her by will, or by intestate, nor accept the same except with benefit of inventory. II. That neither can she make any contract, nor withdraw from those entered into, nor release any one from them, nor make quasi contracts and enter into suits either as plaintiff or defendant. and if she enters herself or by attorney, whatever she does shall not be valid. III. That the husband can give license to his wife to contract, and do all that without the same she could not do, and that the same being given to her, all that she may do by virtue thereof is valid. And if the husband does not give it, he may be compelled thereto by the judge upon hearing or legal and necessary cause; and if even being compelled he does not give it; it shall be given by judge, who may give the same also upon hearing of cause, the husband being absent and his return not soon expected, or there being danger in

the delay, and all that is done under the license of the judge shall be valid, the same as if the husband had given it. IV.

\* \* \* V. \* \* \*

#### APPENDIX IV.

The following is quoted from "Elements of Spanish Law," by Don Joaquin Escriche, (1840), translated by Bethel Coopwood (1886):

## "TITLE IV.

# Of the Effects of Matrimony.

Q. What are the effects matrimony produces?

A. The following: 1. \* \* \* 2. The authority of the husband over the wife with respect to her contracts and management of her property. 3. \* \* \* 4. \* \* \* 5. the community of property. (Laws 47, 54, 55, and 56 of Toro; Law 5, tit. 2, p. 3; Law 1, tit. 8, p. 4; Laws 3 and 4, tit. 17, p. 4, and Laws of tit. 4, lib. 10, N. R.)

Q. What community is this?

A. A certain legal society which is established between the consorts, whereby all the ganancial property is made common to both by halves, although one may have brought more capital than the other. (Laws 1 and 3, tit. 3, lib. 3; Fuero real, or Laws 1 and 3, tit. 4, lib. 10, N. R.)

Q. What are the ganancial properties?

A. All those which the husband and the wife, or either of them, during the matrimony and living together, acquire by purchase or by means of their labor and industry, as also the fruits of the separate property each brought to the matrimony, and of those they acquire *per se* by any lucrative title, as inheritance, legacy, or donation. (Laws 1, 2, 3, 4, and 5, tit. 4, lib. 10, N. R., and Laws 3, 9, and 11, tit. 4, lib. 3, Fuero real.)

Q. How is this society or community of property extinguished?

A. It ceases by the death of one of the consorts, by the confiscation of the property of either of the two, by renouncement of the wife, by legitimate separation, and by adultery of the wife, but in this case only to her injury. (Laws 5, 9, 10, and 11, tit. 4, lib. 10, N. R., and Law 5, tit. 17, p. 7.)

Q. What are the charges of this society?

A. The debts contracted during the matrimony, the donations of the daughters, and the donations propter nuptias of the sons. (Law 14, tit. 20, lib. 3, Fuero real; Law 207 of Estillo, and Law 53 of Toro, or Law 4, tit. 3, lib. 10, N. R.)

Q. Who has the dominion in the ganancial property?

A. The dominion in this property is common to both during the society, but only the husband can alienate it while both are living, even without the consent of the wife, provided he does not do it with intent to injure her. (Laws 1, 4, and

5, tit. 4, lib. 10, N. R.; Molina of Primog., lib. 2, chap. 10, and Gutierrez, lib. 2, Prac. Quaest. 121.)"

The following is quoted from Escriche's "Diccionario Razonado de Legislación y Jurisprudencia," Tomo. 2, pages 86 et seq.:

## (Text.)

Bienes Gananciales.— Los que adquieren por un titulo comun lucrativo u oneroso el marido y la mujer, durante el matrimonio y mientras viven juntos; ó los que el marido y la mujer, ó cualquiera de éllos, durante el matrimonio viviendo "en uno," adquieren por compra ó mediante su trabajo ó industría; como tambien los frutos de los bienes propios que cada uno lleva al matrimonio y de los que adquiere para si por algun titulo lucrativo mientras subsiste la sociedad conjugal. \* \* \* No se cuentan entre los bienes gananciales:-los que tenian los conjuges antes de contraer el matrimonio, -Los que adquieren durante el por herencia, donación ó legado, que se hiciere á uno de ellos \* \* \* (and others).

El marido y la mujer

## (Translation.)

Ganancial Properties. -Those which are acquired by a common, lucrative or onerous title. by the husband and the wife during the marriage and while they live together; or those which husband and wife, or either of them, during the marriage and living as one (en uno). acquire by purchase or by means of their work and industry; as also the fruits of the private properties which each of them takes into the marriage, and of those which they acquire for themselves by some lucrative title while the conjugal society lasts.

All that the husband and the wife gain, is common to both. "All things that the husband and wife gain or purchase, they being together (estando en consuno) says Law 1, Title 5, Book 3, of the Fuero Real, be-

tienen el dominio de los bienes gananciales (citing L. 1 y 4 tit. 4 lib. 10 Nov. Recop.); con la diferencia de que el marido lo tiene en "habito" v en "acto" como se explican los autores. y la mujer solo en "habito," pasando el "acto" cuando se disuelve el matrimonio. Por la mujer no puede dar ni enajenar dichos bienes durante el matrimonio. mas el marido puede, sin el consentímiento de la mujer, hacer entre vivos enagenacióes y aun donaciónes moderadaos por justas causas; pero serán nulas las donaciónes excesivas ó caprichosas ye las enajenaciónes hechas con animo de defraudar á la mujer, la cual tendrá acción en éstos contra los bienes del marido y contra el posedor do los cosas enajenadas. \* \* \*

Los bienes gananciales son comunes del marido y de la mujer y pertenecen á cada uno de ellos por mitad, aunque el marido tenga mas bienes propios que la mujer ó la mujer mas que el marido, aunque el uno

longs to both in half." "Even though the husband has more than the wife, or the wife more than the husband, whether in land or in movables, says Law 3 d. title and book, the fruits shall be common to both in half." Laws 1 and 3, title 4, Book 10, Nov. Recop.

As in some cases doubts may arise as to whether certain properties are of this class or not, it is necessary to have in mind, for better clearness of some points which occur, that the following are reputed to be

gananciales:

The private properties of the husband or of the wife which are found intermingled in such manner or mixed so that it cannot be known to which of them they belong, and neither of them can prove their right of ownership, Law 4, Book 10 Nov. Rec. (2); for which reason upon contracting the marriage it is advisable to execute a public instrument writing in which appears those which each consort had. (3.)

gane despues mas que el otro, v en fin, aunque sea uno solo el que los adquiere; comerciando ó trabajando; pues en virtud del matrimonio se establece entre los dos consortes una sociedad legal, diferente de las otras, por la que se comunican reciprocamente sus adquisiciónes (citing Leves 1, 2, 3, 4, y 5, tit. 4 lib. 10 Nov. Recop.)

Mas esta comunicación ó comunión de bienes cesa en los casos siguentes:-

1º Cuando se confiscan los bienes á uno de los conjuges; pero ninguno pierde su parte de gananciales, por el delito del otro,—(citing L. L. 10 y 11 tit. 4 lib. 10 Nov. Recop.) 2. ó En que el principio de derecho criminal segun el cual, solamente el culpable debe sufrir las respensabilidades inherentes al delito. 3. 0 \* \* \*

ó Cuando mujer renuncia los gananciales, en cuyo caso no es responsable el pago de las deudas del matrimonio.

-3. ó Cuando la mujer se queda en su casa, sin

The fruits of any usufruct which either of the consorts may have, Greg. Lop. gl. 2 of the Law 18, 11. Part 4. and Gomez in the law 50 de

Toro, No. 78.

The fruits of the legacy or bequest which may have been left to one of the consorts, even though on account of suit having been brought as to the validity thereof the delivery is delayed until after the death of the consort. Febr. Nov. lib. 1 tit. 2, cap. 8, No. 11. The price of the patrimonial property which during the marriage is bought or recovered by right of retraction or by virtue of stipulation for reconveyance, as to such part of said price came out of the common fund, Gomez in law 70. of Toro, No. 28.

The value of the offices of regidor, notary or others which are bought during the marriage: which should be adjudicated in ease of partition for the price which they may then have and what they cost, Gomez in law 29 of Toro. No. 21, and in Matienzo ir á cohabitar con el marido, á no ser que haya dado á este la dote segun opinión de algunos

autores.

-4 ó Cuando los consortes se separan con legitima despensa pues entonces cada uno hace suvo privadavamente lo que adquiere despues de la separación; pero si el marido echaré de casa á la mujer sin causa legitima ó la trataré cruelmente do modo que se vea obligada á separarse de el, adquirira esta no obstante su mitad de gananciales durante la separación del mismo modo (en uno), acquire by purchase mun de autores.

—5. ó Cuando la mujer comete adulterio, etc.

. . .

6. ó Cuando muere alguno de los consortes, como es claro; pues aunque los bienes comunes de la herencia queden en poder del otro "pro indiviso" no puede entenderse continuada con los difunto herederos del sociedad especial, esta tacitecontraida sino mente otra nueva segun las reglas generales. Es

in law, 5, tit. 9, lib. 5,

gl. 4.

That which the husband acquires by means of military services or "castrenses," and the recompenses which the government gives him by virtue thereof, provided he serves without salary and mainfains himself at the expense of the capital of both, law 2, tit. 4, lib. 10, Nov. Rec.

That which the husband gains exercising the offices of judge, attorney or others which are considered as quasi castrenses, law 5, tit. 4 lib.

10, Nov. Rec.

The cost of the improvements which are made in the free properties of either of the consorts, laws 5 and 9, tit. 4, lib. 5, Fuero Real.

The returns which the consort may have given who exchanged any of his lands, because by reason of the former there was acquisition.

The following are not counted among the gananancial properties: — Those which the consorts had before contracting the marriage, law 3, tit. 4, lib. 10, Nov. Rec. de advertir, por ultimo que la mujer que en estado de sue viudez vive escandalosamente, pierde los gananciales á beneficio de los herederos de su marido. B." Those which they acquire during the same by inheritance, donation or legacy which is made to one of them; laws 2 and 5 tit. 4, lib. 10, Nov. Rec.

Those purchased with money of any properties sold which is the property of the husband or of the wife; law 11, tit. 4, lib. 3, Fuero Real.

Those exchanged for properties pertaining to one of the two only; d. law 11.

The purchases with dowry and good will money of the wife; law 49, tit. 5, Part 5.

The right of usufruct, and any other personal right which either of the consorts has in his or her favor; Gomez in law 50 Toro, No. 78.

The patrimonial properties which are bought by right of retraction; Gomez, on law 70 of Toro, No. 28.

Those which either of them may have sold before the marriage with stipulation for reconveyance, and after marriage recovers by reason of such stipulation; Gomez d. No. 28.

The remuneratory do-

nations which are made to one of the consorts by reason of peculiar merits; laws 1 and 5, tit. 4, lib.

10, Nov. Rec.

Whatever the husband acquires by means of military services or castrenses, or what is given to him in recompense thereof by the Government, when he receives a salary and subsists therefrom; laws 2 and 5, tit. 4, lib. 10, Nov. Rec.

The cost of improvements made in properties of the estate; law 46 of Toro.

The improvements or increases which the properties belonging to each of them receives solely from the benefit of nature or time, without industry nor work; Covarr., Go-

mez y Matienzo.

The husband and the wife have the dominion of the ganancial properties, laws 1 and 4, tit. 4, lib. 10, Nov. Rec., with the difference that the husband has it in custom (habito) and in act (acto), as the authors explain, and the wife only in custom (habito) the

act (acto) passing to her when the marriage is dissolved. For that reason the wife cannot give nor convey said properties during the marriage, but the husband can without the consent of the wife make their inter vivos conveyances moderately for just causes; but the excessive or capricious gifts will be null, and the conveyances made with intent to defraud the wife, who will have action in all these cases against the properties of the husband and against the possessor of things conveyed; law 5, tit. 4, lib. 10, Nov. Rec.; Molina, De Primog., lib. 2, cap. 10; and Gutierr., lib. 2, Pract., quaest. 121. The following are charges of the gananciales: 1st. The debts which are contracted during the marriage by reason of the conjugal society, but not those which each consort had before the marriage. as these should be paid from their own properties; law. 14, tit. 20, lib. 3, of Fuero Real. Law 207 of Estilo; 2d. The dowerys of daughters and the gifts

propter nupcias of the sons, whether promised them by both, or by the husband alone. If the ganancial properties are not sufficient to cover the dowervs donations or promised, the consorts shall pay in halves from their own properties what is lacking, in case that both made the promise; but if only the husband made the promise, he alone should satisfy the deficit which results: Law 53 de Toro, or Law 4. tit. 3, lib. 10. Nov. Rec.

The ganancial properties are in common of the husband and the wife. and belong to each of them in half. even though the husband has more private properties than the wife, or the wife more than the husband, even though one gains more afterwards than the other, and finally even though one only may acquire them trafficking or working; because by virtue of the marriage there is established between the consorts a legal company. different from the others. whereby their acquisitions are reciprocally communicated to them: laws 1, 2, 3, 4 and 5, tit. 4, lib. 10, Nov. Rec.

But this communication or communion of properties ceases in the following cases: 1st. When the properties of one of the consorts is confiscated: but neither loses his or her part of the gananciales for the crime of the other, laws 10 and 11, tit. 4, lib. 10, Nov. Rec. 2d. When the wife renounces the gananciales, in which case she is not responsible for the debts of the marriage, law 9, tit. 4, lib. 10, Nov. Rec.; it being understood that she can make this renouncement before contracting the marriage. after contracted, and after it is dissolved. 3. When the wife remains in her house, without going to cohabit with the husband, unless she has given to him the dowery, according to the opinion of some authors. 4th. When the consorts separate with the legal license, as then each makes his or her own privately whatever they may acquire after the separation; but if the husband expels the wife from the house without

legal cause, or treats her cruelly so that she is compelled to separate from him, she will nevertheless acquire her half of the gananciales during the separation, in the same manner as before, according to the common opinion of the authors. When the wife commits adultery, as for this crime she forfeits the gananciales in favor of the husband. Law 5, tit. 17, Part. When either of the consorts dies, as is clear; because although the common properties of the remain inheritance possession of the other pro indiviso, it cannot be understood as continued with the heirs of the deceased in this special partnership, but rather that a new one is tacitly contracted according to the general rules. should be noted lastly, that the wife who in her state of widowhood lives scandalously, loses the gananciales in benefit of the heirs of her husband. Law 5, tit. 4, lib. 10, Nov. Rec.

The ganancial properties are made common from the time that the

marriage is contracted until it is dissolved, and consequently there should counted as among them not only the natural and civil fruits which are collected or received within that time. but also the natural fruits which have appeared and are found pending. But if the fruits have not yet appeared nor are pending when the marriage is dissolved, being of trees or plants which are not sown, they belong to the owner of the soil on which they are found, and there should only be credited to the other consort the half of the value of the work and the expenses which they may have made for the production, e. g., those of the hoeing, pruning, etc., but if they are of sown lands, they should be divided in half. If the land is plowed and not planted, there will be credited to the surviving consort the half of the expenses which are made thereon: Law 10, tit. 4, lib. 3, of Fuero Real; and Ant. Gomez in law 55 of Toro n. 71. If the fruits of increase of flocks and of

any other productive animals, they will be communicated as industrials between both consorts. even though they are not born, provided they exist in the wombs of the females; and as regards the wool of the flocks of sheep, if it is grown, it will be separated shearing, and deducting the expenses made in the shearing and the support of the cattle, the net results will be divided between the consorts: Ant. Gomez in law 53 of Toro, No. 71, and the practice.

If the wife should bring in the dowery real properties with fruits already showing, and should die before they are gathered, these fruits shall belong to the husband in case that the properties were delivered to him appraised with a value which caused sale: and they shall only belong to him as regards the half, after deducting the expenses, in case he has received the properties without appraisal. But if the wife had renounced the gananciales. said fruits should not then be divided in half.

but shall be divided into as many parts as there were months, weeks or days passed since the date of the marriage and the day of the crop gathering, and after deducting the expenses of gathering and others, the husband will receive those which are due him in the months and days during which the marriage subsisted, whether more or less than the half, and the remainder will belong to the heirs of the wife; Law 26, tit. QQ, Par. 4, and various authors.

If a property of the husband or of the wife is rented, there shall be divided in half between the survivor and the heirs of the deceased the part of the annual rental corresponding to the time that the marriage subsisted, leaving the part after the marriage for the owner of the property or his heirs.

If the fruits pending are from an estate of inheritance (mayorazgo), the division shall be made in the following manner: If being married an estate of inheritance should fall

to one of the consorts, with the fruits ready to be gathered, there shall belong exclusively to such one the fruits which fall to him or her in the partition with the heirs of the last deceased possessor; but if they are not in that condition, the other consort shall have half of those assigned to the said heir. If the husband is possessor of an estate of inheritance and dies leaving the fruits pending on the entailed properties, the widow will have onehalf of the net returns thereof corresponding to the time that she lived with her husband; and the remainder up to the time of the gathering belongs to the successor of the estate; but if the wife should be the one deceased, there belong to her heirs the half of such pending fruits and of the expenses made in work of the properties plowed. The same will be observed concerning the husband, if the estate belonged to the wife. the Fructiferous properties of the estate were rented, the interests or incomes will be divided

pro rata according to the time that the deceased lived.

The wife, upon the death of the husband, acquires the full ownership and the administration of the half of the gains made in the marriage, and may freely dispose of the same, either by contract inter vivos or by will, without the obligation to reserve the same for the children of the marriage, Law 14 Toro; provided that in the testamentary dispositions she does not injure the heirs in their estate. In the same manner can the husband dispose of his half of the ganancial properties, without obligation to reserve the same for said children; d. law 14 of Toro.

## APPENDIX V.

The following is quoted from Febrero's Librería de Escribanos. Cinco Juicios 1, Lib. I, Cap. IV, Sec. 1, (pages 237 et seq.):

(Text.)

1. Deducidos los bienes. que el marido, y su mujer acreditarán haber puesto por fondo, y entrado en su sociedad conjugal al tiempo de casarse, y despues de casados (va sean, ó no enteramente suyos, pues una vez que entrán en el fondo de ella, deben sacarse al tiempo, de su disolución antes que todo, aunque sean agenos, si no se entregarón á sus dueños mientras subsistio, para que se los pague el que los llevo, y á este fin aplicarsele,) y las deudas contraidas constante su matrimonio verdadero en la forma, y terminos explicados en el anterior capitulo, es incremento, v utilidad de la misma sociedad todo el residuo, y, como ganancial, ó multiplicado se debe comunicar en estos Revnos de Castilla, y dividir por (Translation.)

1. After deducting the properties which the husband and his wife prove having placed as fund, and entered into the conjugal society at the time of marriage, and after the marriage (whether entirely theirs or not, as once they have entered into the fund thereof. they must be taken out at the time of its dissolution before all else. even though they belong to others, if they were not delivered to their owners while it existed, so that they may be paid by the one who contributed them, and to this end applied to him) and the debts contracted during their true marriage in the manner and terms explained in the foregoing chapter, all the remainder is increment and profit of the said society. and as ganancial, or mul-

mitad entre los dos, si viven juntos, segun lo ordena la ley 2. tit. 9. lib. 5. Recop. que dice: Toda cosa que el marido, y la mujer ganarén, ó comprarén estando de consuno, hayanlo ambos por medio, y si fuere donadio de Rey, y lo diere á ambos, hayanlo marido, y mujer: y si lo diere al uno, havalo solo aquel á quien lo diere. Lo cual era al contrario por derecho antiguo, pues todos los bienes se presumian pertenecer al marido, y la mujer llevaba mente los que probaba ser suyos, para evitar la sospecha de que los hubiese adquirido de trato ilicito; excepto que tuviese arte, u oficio con el qual los gañase honestamente, pues en este caso no se la desposeia de los que alegaba pertenecerla, v sobre ello era oida. (1) En quanto á como se ha de dividir entre el superstite, é hijos de ambos conyuges la parte del caudal de estos puesta en fondo vitalicio, y loque se debe practicar, vease el cap. 2 n. 18. de mi primera parte adicionada al fin.

tiplied, shall be communicated in these Kingdoms of Castilla, and divided in half between the two, if they live together, as ordered by law 2, title 9, Book 5, Recop., which "All things that savs: the husband, and the wife gain or purchase being together, shall be had by both in half, and if they be gift of the King. and they be given to both, they shall be had by husband and wife: and if given to one, they shall be had only by the one to whom they are given." Which was to the contrary under the old law, as all the properties were presumed to belong to the husband. and the wife had only those which she proved to be hers, to avoid the suspicion that she had acquired them by illicit means; unless she had an art or occupation with which she gained the same honestly, as in this case she was not deprived of those which she alleged belonged to her, and she was heard thereon. (1) As regards how should be divided tween the survivor and

children of both the part of the capital placed in the annuity fund and as to what should be done, see chap. 2 n. 18 of my first part added at the conclusion hereof.

2. La conclusion sentada en el numero precedente, milita, y ha lugar no solo quando marido, y mujer cohabitan en un mismo Pueblo, y casa, sino aunque esten en diversos, con tal que subsistan el matrimonio, y su mutuo consentimiento. y union de voluntades, y no hava mediado divorcio, v. g. si el marido esta empleado, y la mujer porque el clima es nocivo, á su salud, ó por otro justo motivo se queda en su patria, ó si en ella tiene algun trafico, y el marido otro en otra parte: pues en estos, y casos semeiantes subsisten el matrimonio. y la sociedad, y union de sus voluntades, aunque no la de sus cuerpos, y asi todo quanto lucren uno, u otro, ó ambos, se debe comunicar, y dividir por mitad: (2) no obstante decir algunos que para esto es preciso la simul-

The conclusions set forth in the foregoing number, holds good and applies not only when the husband and wife cohabit in the same town and house, but even if different they are in places, provided the marriage subsists, and their mutual consent and union of wills, and no divorce has intervened, e. g., if the husband employed and the wife. because the climate is health, hurtful to her o r for some other remains in country, or if she has therein some business. and the husband another business elsewhere: these, and other similar cases, the marriage, and the society and the union of wills subsist, although not that of their persons, so that all that one or the other or both gain, should be communicated and divided in half: nottanea cohabitación; pero se desestima su parecer como destituido de fundamento solido.

- 3. Lo mismo procede, ya lo gañen ambos, ó el uno solo constante matrimonio, pues aunque él uno nada trabaje, no dexará por eso de participar de las utilidades, porque para este unico efecto mediante la legal concesion son socios de companía universal, en la qual no se impide la sociedad, v participación del lucro, por comerciar, y trabajar el uno, y nada hacer el otro, respecto a que se negocia con el caudal, y a nombre de ambos, aunque suene uno solo. (1) pues para dicho fin se estiman en el legal concepto por una persona.
- 4. Sino consta, ni se acredita que bienes llevo cada uno al matrimonio, ó durante el heredo, ó le donaron parientes, ó extraños por su mera contemplación, y no por la

- withstanding that some say that for this there is necessary the simultaneous cohabitation; but this opinion is rejected as destitute of a solid foundation.
- The same applies, 3. whether gained by both, or one only during marriage, because though one may not work at all, such one would not therefore be unable to participate in the profits, as for this sole purpose through the legal concession they are partners inuniversal partnership, in which the society is not impeded nor the participation of profits, by reason of one doing business and working, and the other doing nothing, as concerns the doing business with the capital and in the name of both, although only one acts, because for that purpose they are in the legal mind considered as one person.
- 4. If it does not appear nor be proved what properties each of the m brought into the marriage, or were inherited during the same, or were donated by parents or

de la sociedad conyugal, ó su importe, todos, se conceptuan adquiridos en su intermedio, y deben dividir en la forma expresada, segun se prueba de la lev 1. de dicho tit. v lib. cuvo contexto es: "Como quier que el Derecho diga que todas las cosas que han marido, y muger, que todas se presumen ser del marido. basta que la muger muestre que son suyas; pero costumbre guardada es en contrario, que los bienes que han marido, y muger, son de ambos por medio, salvo los que probare cada uno que son suvos apartadamente; v ansi mandamos que se guarde por lev." Pero si alguno de ellos acredita los que heredo ex testamento, ó abintestato, ó le donaron, ó legaron en la forma expuesta, ya sean muebles, raices, ó de otra clase sin excepcion, seran suvos privativamente, y se deberan separar, aplicarsele, porque la adquisición que proviene de la sucesion, no pertenece á la sociedad, como esta resuelto en derecho. (2)

others for their own use and not for that of the marriage society, or the value thereof, they are all considered as acquired that interval. should be divided in the manner stated, as is provided by law of said title and book, the context of which is: "Although the Law says that all the things had by husband and wife, all are presumed to belong to the husband, until the wife evidences that they are hers; but the custom observed is to the contrary, that the properties had by husband and wife belong to both by halves, except those that each prove to be theirs separately: and we so order that it be observed by law." But if either of them prove those which he or she inherited by will, or abintestate, or was donated or devised in the manner stated. whether they be movables, real estate, or other kind without exception, they shall be his or hers privately, and should be separated and given to him or her, because the acquisition arising from

5. En la Villa de Albuquerque, Ciudad de Xerez de los Caballeros, y Pueblos de su Comarca, en que se observa el fuero denominado del Baylio, todos los bienes que marido, y muger llevan a su matrimonio, y heredan, y adquieren despues por qualquier titulo, son communicables como gananciales entre ambos, aunque el uno nada lleve, no pactandose al tiempo del casamiento lo contrario. ó casar segun el de Leon, cuvo fuero esta mandado observar por Real Cedula de 20. de Diciembre de 1778. \* \*

6. Los bienes que como gananciales, ó mutiplicados se deben dividir con igualidad entre marido, y muger, son no solo los que entrambos comprán durante su matrimonio con el dinero, y caudal comun, (1) sino los que compra el marido por si solo, ó su muger con su licencia tacita, ó expresa,

the succession does not belong to the *society*, as is provided by law.

5. In the Villa de Albuquerque, Ciudad Xerez de los Caballeros. and Pueblos of its Comarca, in which is observed the law named of Baylio, all the properties which the husband and wife take into the marriage, and inherit, and acquire afterwards any title, are communicable as gananciales between them both, even though one of them contribute nothing, if it is not stipulated at the time of the marriage to the contrary, or they are married according to that of Leon, which law is ordered to be observed by the Royal Cedule of December 20, 1778.

6. The properties which as gananciales, or multiplied, should be divided equally between the husband and wife, are not only such as are purchased between them during the marriage with the common money and capital, but also those which the husband purchases alone, or the wife

ya sea el dinero comun, ó de qualquiera de los dos, pues de todos modos se les comunican en la forma expuesta, (2) porque se atiende al tiempo de su adquisición, y no a la persona, en cuyo nombre sueña la venta, y a parecen comprados. purchases with his tacit or express license, whether it be with the common money, or that of either of the two, as they are at all events communicated to them in the manner expressed, because attention is paid to the time of its acquisition, and not to the person in whose name the sale is made and they appear as purchased.

8. Son igualmente comunicables entre marido, y muger lo comodidad, y frutos del usufructo de alhaja, ó finca que uno de ellos llevo en propiedad al matrimonio, y durante este se consolido con ella, por haber fallecido el que lo usufructuaba, a por otra causa, ó

motivo, (5) pues se con-

ceptua haberla llevado en propiedad, y usufructo.

7. \* \* \* \* \*

The profits and fruits of usufruct of furniture or land which one of them took into the marriage in property, and which was consolidated therewith during the marriage by reason of the death of the person who had the usufruct thereof, or for some other cause or reason, are also equally communicated between the husband and wife, as they will be considered as taken into the marriage in property and usufruct.

9. \* \* \* \* \* \* 10. \* \* \* \* \*

10. \* \* \* \* \*

11. Son comunicables tambien á los conyuges

11. There are communicable also to the con-

los frutos de la parte de herencia, ó legado que el testador dexo á alguno de ellos, y se vencierón despues de su muerte, no obstante que sobre validación del legado, ó división de la herencia hava habido pleyto, y tardado por este motivo en hacerse la partición; y entrega; pues sin embargo de que Ayor, part. 3. quoest. 29. afirma que el legatario, ó coheredero los ha de llevar precipuos como la cosa legada, fundandose en que no llama tener perfectamente la cosa mientras no se posee, realmente, y con efecto, y en que los conyuges no pusieron trabajo en su producción, el qual es el motivo fundamental de le ley para que participen de ellos: no debe seguirse su dictamen: Lo primero, porque el legatario en el instante que fallece el testador. adquiere dominio en lo legado, como especifico, (1) v desde el dia de su adquisición se le deben los frutos, (2) y especialmente desde la litis contestación, desde la qual se constituye poseedor de mala fé el colitigante. (3)

sorts the fruits of the part of inheritance, or legacy which the testator left to either of them. and which matured after his death, notwithstanding that there may have been suit relative to the validation of the legacy or division of the inheritance, and the making of partition delayed thereand delivery; cause though Avor. part. 3, Quaest. 29, affirms that legatee, or co-heir, the should take the same precipuos as a thing devised, founded on that he is not held to have the thing perfectly while it is not possessed in reality and with effect, and in that the consorts did not put any work into its production, which is the fundamental reason the law for them to participate: its decision should not be followed: First, because the legatee upon the instant that the testator dies, acquires dominion over the legacy, as specific, and from the day of his acquisition the fruits are due him, and especially from the legal answer, from which time the colitigant constitutes

Lo segundo, porque la ley no requiere, ni pide, precisa, é indispensablemente que los conyuges pongan su industría, y trabajo material en su producción, pues basta que constante su sociedad, y union de voluntades se produzcan, y devenguen; y la prueba de ello es el concederselos hasta de los bienes castrenses, y casi castrenses que no se les comunican, como dire en el capitulo siguiente 5. num. 37, pues si su personal trabajo fuera indispensable, no se comunicarían los réditos. siones, y otros, en que nada mas nacen, ni tienen que hacer, que percibirles. Y lo tercero. porque la demora en determinarse el pleyto no daña al conyuge, ni por la sentencia adquiere cosa nueva, sino unicamente declaración del derecho que tenía adquirido, como lo expresa la ley Sicuti autem. siquidem 4. ff. Si servitus vindicetur, ibi: Quia per sententiam non servitus constitui, sed quae est, declarari: es así que declara pertenecerle los frutos desde entonces:

himself possessor in bad faith. Second, because the law does not require nor ask certainly and indispensably that the consorts place their industry and material work in its production, it sufficing that during the society and union of wills, they be produced and originated; and the proof of this is that it is granted to them even of the properties "castrense" "Quasi castrenses, which are not communicated to them, as I will show in the following chapter \$5, No. 37, as if their personal work were indispensable, there would not be communicated the interests, pensions, and other in which they do nor have to do anything more than to receive them. And third, because the delay in determining the suit does not injure the consort, nor is he given any new thing by the sentence, but only the declaration of the law that he had acquired, as is expressed by the law "Sicuti autem, et siquidem 4 ff. Si servitus vindicetur, ibi: Quia per tententiam nos servitus constiluego es lo mismo que si desde este tiempo hubiera empezado á per cibirlos; y mas, habiendose seguido el pleyto á costa del caudal de ambos, por lo que se retrotrae á él. tui, sed quae est, declarari:" so declaring that the fruits belong to him from that time: then it is the same as if from this time he had commenced to receive them; and further, the suit having been continued at the expense of the capital of both, wherefore it returns to it.

12. \* \* \* \* \*

Se comunica por 13. mitad entre los socios conyugales el precio del fundo patrimonial, que constante matrimonio retrae el marido por derecho de sangre, como mas inmediato consanguineo, pero no el fundo; (2) por lo que aunque el valor de este se inventarie, y considere (segun se debe) como aumento caudal de ambos. para saber a quanto ascienden las utilidades de la sociedad, no se ha de dividir entre ellos, sino applicarse integro al marido como dueño en parte de pago de su mitad; y por su muerte á sus herederos, como que le suceden en todas las acciónes activas, y pasivas trans12. \* \* \* \*

13. There are communicated in half between the conjugal partners the price of the patrimonial property, which during the marriage the husband recovers by right of blood, as nearest relative, but not the property itself: wherefore, even though the value of the latter be inventoried, and considered (as it should be), as increase of the capital of both, in order to know what the profits of the society amount to, it should not be divided between them, but applied in full to the husband as owner in part payment of his half; and upon his death to his as they succeed heirs. him in all actions, assets,

misibles, y le representan v ocupan su lugar: v a la muger se dará otra cosa por la mitad que la toca de su valor; pues á ninguno se debe despojar del dominio de sus bienes conocidos para adjudicarlos al otro, sin que preceda su consentimiento, ó que en otros termínos no se le pueda hacer pago de su haber. como dexo advertido al contador en el cap. 2. num. 49.

14. La estimación, ó valor de los oficios de Regidor, Esscribano, Procurador, Alguacil, v otros enagenados de la Corona. que durante el matrimonio compran los convuges. se les debe comunicar en los propios terminos, porque estos oficios por costumbre de estos Revnos. tacita permision del Soberano se venden, dan in solutum, v hace execución en ellos, v como transmisibles á los herederos se colacionan. modo que otros bienes, v se les aplican en las particiónes. (1)

and liabilities transmissible, and represent and take his place; and to the wife will be given something else for the half that pertains to her of its value: as no one should be deprived of the dominion of their known properties to adjudicate them to another, without his consent is first had. or that in other words payment shall not be made from his property. as I have explained to the accountant in chap. 2. No. 49.

14. The estimation, or value of the offices of Regidor, Notary, Procurator, Alguacil, and others granted by the Crown, which during the marriage is bought by the consorts, should be communicated to them in the same terms, because these offices by customs of these Kingdoms, and tacit permission of the Sovereign are sold, given "in solutum," and execution is made in them, and as transmissible to the heirs are placed, the same as other properties, and applied to them in the partitions.

15. Pero ese de adverti que aunque los convuges los havan comprado por poco, si al tiempo de la partición tienen mayor valor, se han de adjudicar por el que entonces se les de, y no por el que costaron, (pues su intrinseco incremento toca á la sociedad conungal, al modo que la tocaria el decremento si la tuviesen) y de la mitad debe participar la muger: (2) por lo que si esta fallece con hijos: se vuelva á casar su viudo: muere dexandolos tambien del segundo matrimonia: v existe el oficio al tiempo de su muerte: llevarán los del primero su mitad con su aumento intrinseco como parte de herencia materna: y partiran con sus medios hermanos la otra mitad como herederos todos de un mismo padre; porque aquella mitad por ser adquirida, y dexada por madre, ese privativa de ellos, y no de hermanos, SUS medios ni madrasta, segun expuse en el capitulo 2. num. 49, cerca del fin. Lo qual se practica, y debe practicar no solo con esta clase de bienes, sino in-

15. But it is to be noted that though the consorts may have bought them for little, if at the time of partition they have a greater value, they should be adjudicated for the value then given them and not for what they cost. (as their intrinsic increment belongs to the conjugal society, in the same manner that its decrease would fall to it should there be any) and the wife should participate in the half; wherefore if the wife dies with children, and her widower marries again and dies leaving children also of the second marriage: and the office exists at the time of his death: the children of the first marriage will take their half the intrinsic increase as part of the maternal inheritance: and the other half will be divided with their halfbrothers, all as heirs of the same father; because the former half having been acquired and left by their mother, it is theirs privately, and not their half-brothers, nor stepmother, as explained in chapter 2. No. 49 near distintamente con otros cualesquiera comprados, ó adquiridos por ambos durante su sociedad, porque como dueña la sigue el aumento, ó menoscabo que en ellos haya, y los de el tiempo; excepto interesados que los convengan en lo contrario, como siendo mayores de veinte y cinco años, lo pueden hacer. Lo propio milita con el derecho de Patronato adquirido por el marido constante matrimonio por fundación, dotación, o construción de alguna Iglesia, pues tambian se comunica á entrambos. (1)

16. Supuesto ser comunicable ó los conyuges la estimación, ó valor de los referidos oficios comprados constante matrimonio, se pregunto: "Si habiendo comprado alguno el marido antes de casarse, pero no pagado enteramente su precio? O si estando gravado con algun censo, se casa, y despues con el dinero dotal de su muger acaba de pagarlo, ó libera el censo,

the end. All of which is practiced, and should be practiced not alone with this class of properties, but also indistinctly with others whatsoever purchased, or acquired by both during their society, because the increase, or diminution which they may have or which time gives them, follows her as the owner; unless the interested parties agree otherwise, as they may if over twenty-five The same vears of age. applies with the right of Patronage acquired by the husband during marriage, by foundation, dotation, or construction of any Church; which also is communicated to both.

16. Taking for granted that the estimation, or value of the said offices purchased during marriage, are communicable, it is asked: "If one has been purchased by the husband before marriage, but its price not entirely paid? Or if being encumbered with some charge. he marries, and afterdotal with the wards money of his wife completed the payment, or tendra parte la muger en el mismo oficio por la subrrogación de su dinero, con que se acabo de pagar, ó redimio el gravamen. Y si el aumento, ó mayor valor que tenga al tiempo de la disolución del matrimonio, sera ganancial, y como tal comunicable?

17. Y se responde á lo primero, que aunque es indubitado que lo que se compra con el dinero dotal, se contempla dotal, y lo comprado se subrroga en el precio por ello dado, (2) segun, y en los terminos que expuse en el num. 6. y en el cap. 3. num. 26. al 28. No obstante, en el presente caso es diverso, porque no se compro durante el matrimonio, y solamente se pago lo que se debía, y por la nuda, y simple solución no se transfiere el dominio á la muger, por lo que mucho menos se puede hacer por ella la subrrogación, pues para esta han de intervenir simultanea, y copulativamente no solo la solución,

discharges the encumbrance, will the wife have part in the said office by the subrogation of her money, with which he finished paying for, or redeemed the encumbrance? and if the increase, or greater value which it may have at the time of dissolution of the marriage, will be ganancial, and as such communicable?

17. And it is answered to the first, that though it is undoubted that what is purchased with the dotal money is considered as dotal, and what is purchased is subrogated in the price given therefor, according to, and in the terms set forth in No. 6 and in chap. 3, No. 26 to 28. Nevertheless, in the present case it is different, because it was not purchased during the marriage, and payment was made only of what was owing, and for the mere and simple solution ownership is transferred to the wife. and therefore much less can the subrogation be made by her, as for this there must intervene simsino la compra, como se prueba de los textos citados, y de otros. (3) A mas de que el marido recibe el dinero dotal que se le prometio, como acreedor á el, y el acreedor, despues de percibir su credito, puede darlo en pago á otro suvo, ó disponer de el á su arbitrio como dueño, porque se le transfiere su dominio: y así dexa de ser dotal, v por consiguiente no ha lugar la subrrogación.

18. Y á lo segundo, que el mayor valor que tenga el oficio, no sera communicable, antes bien tocara unicamente á su dueño, porque este val no se adquirio con en trabajo, ni industria de ambos, ni ellos se lo dieron, sino el timpo, ó tal vez ya lo tenia quando lo compro, aunque en menor se le hubiese vendido; por lo que se le aplicara por el en que lo llevo, al modo que si valiere menos, lo llevará por el mismo; pues asi como quando el aumento, y mejorá subultaneously and copulatively not only the solution, but also the purchase, as is proved in the text cited and in others. Unless the husband received the dotal money which was promised him, as creditor of some, and the creditor after receiving his credit, can give same in payment to another creditor of his, or dispose of the same at his pleasure as owner, because the dominion transferred to him: and it so ceases to be dotal. and consequently the subrogation is not proper.

18. And to the second. that the greater value which office may have, is not communicable. belongs rather to owner only, because this value was not acquired with the work nor industry of both, nor did they give it, but rather the time made it, or perhaps it already had it when purchased, though it was sold to him for less; wherefore it will be applied to him for the value which it had when he took it, and so if it be worth less he will take it

reviene á la alhaja del socio por su naturaleza. o por el tiempo, ó por otra causa accidental, no se comunica á los demas socios: así tampoco se debe comunicar este aumento in trinseco á los conyuges, quando el fundo se hizo de mayor valor por razon intrinseca. (1) Lo mismo procede, y concibo se debe practicar, quando consta que uno de los conyuges llevo á su matrimonio dinero especie suficiente para comprar algun oficio, ó finca, y el otro ninguno, ni bienes, con cuyo producto vendiendolos, se pudiese comprar, ó aunque los llevase, resulta existir sin vender, v á poco tiempo, de casados compra el oficio, ó finca v. g. por veinte, expresando ser con aquel dinero, y al de la muerte de el uno se tasa en sesenta; pues aunque parece que este aumento intriseco debe comunicarse á la sociedad, por haberse comprado el oficio durante ella: lo contrario es lo veridico, y así tocará solamente al dueño del dinero, porque es visto

for the same price; and so also when the increase or improvement attaches to the movables of the one partner by its nature, or by time or other accidental cause, it is not communicated to the other partners: so neither should this intrinsic increase be communicated to the consorts, when the principal was made of greater value by intrin-The sic causes. same applies, and I conceive should be practiced when it appears that one of the consorts took into the marriage money in specie sufficient to purchase some office, or property, and the other none, nor properties from the sale of the products of which it might be purchased, or even should he take the same in it if found that they exist unsold, and after a short time married he purchases the office, or lot, e. g., for twenty, expressing it to be that money, and upon the death of one it is valued at sixty; because though it appears that this intrinsic increase should be communicated to the sohaberse comprado con el, y subrrogado en su lugar: y el otro conyuge como que ni lo tenia para comprarlo, ni puso trabajo en su incremento, á nada tendrá derecho, ni tampoco participará de su decremento, so por solo el timpo lo padeciere; excepto que ambos pacten otra cosa.

19. Tambien se comunica á los casados la donación remuneratoría que se les hace constante matrimonio por los servicios, y meritos contrahidos en este tiempo, porque no es propriamente mera. pura donación lucrativa, sino satisfación del trabajo hecho, ó beneficio recibido; (1) por cuya razon vale la que el padre hace á su hijo constituido en su dominio: (2) como igualmente la que mutuamente se hacen marido, y muger, ó uno solo al otro por sus respectivos; y peculiares meritos; y el ciety because the purchase of the office was made during the same, the contrary is true, and it will therefore go to the owner of the money only, because it is seen that it was bought by him, and subrogated in his place: and the other consort not having the wherewith to purchase same, nor placed any work in its increment, will have no right to anything, nor will he participate in the decrease, if it should suffer it from time only; unless both stipulate otherwise.

19. There is also communicated to the married persons the remuneratory gift which is made to them during marriage for the services or merits rendered in this time, because it is not properly a mere and pure lucrative donation, but satisfaction for work done or benefit received; for which reason the gift which the father makes to his son who is under his dominion is valid; as also that which the husband and wife make mutually, or one only to the other, for their respective and pePrelado Eclesiastico de los bienes de su Iglesia á quien la sirvio, y beneficio; pues aunque no los puedo enagenar, pero por remuneración de los meritos, y servicios hechos en su utilidad, los podrá donar: (3) y en caso de duda siempre se presume hecha por ellos, y en su satisfación, y compensación, (4)

20. \* \* \* \* \*

21. Asimismo se comunica á entrambos conyuges lo que el marido adquiere en la guerra, (que se llama peculio castrense) ó el Rev le dona en remuneración de los servicios que le hizo en ella. Lo qual se entiende, quando sirvio sin sueldo, y se mantuvo á expensas del caudal de los dos, en cuyo los deben dividir por mitad; pero si gozo sueldo, y con el se mantuvo, y no con los bienes comunes, nada tocará á la muger de la donación que el Rey le hizo ó cosa que adquirio en la guerra, como se prueba de la ley 2 tit. 3. lib. 3. del Fuero Real, que es la 3, tit. 9, lib. 5, Recop. culiar merits; and the Ecclesiastic Prelate of the properties of his Church to him who served and benefited it; because although he can not convey them, he may donate them as remuneration of the merits and services in its profit: and in case of doubt it is always presumed made for them and in satisfaction and compensation therefor.

20. \* \* \* \* \* \* \* \*

21. So also will there be communicated to both consorts whatever husband acquires in war, (which is called "Peculio castrense") or is given him by the King in remuneration of his servrendered therein. Which is understood when he served without salary, and maintained himself at the expense of the capital of both, in which case they should be divided in half; but if he received a salary, and maintained himself therewith, and not with the common properties, the wife will take nothing in the donation which the King made him, or thing acquired in the war, as is y. dice: "Si el marido alguna cosa ganare de herencia de padre, ó de madre, ó de otro propincuo, ó de donadio de Señor, o de parientes, ó de amigo, o en la hueste del Rev. ó de otro que vaya por su Soldada, hayalo todo quanto ganaré por suvo. Y si fuere en hueste sin Soldada á costa de si, é de su muger, quanto ganaré de esta guisa, todo sea del marido, é de la muger: Casi como la costa es comunal de ambos, lo que asi ganarén, sea comunal de ambos." Y en su declaración lo coroborá la lev 5. del mismo titulo, y libro. (1) Previniendo que lo donado por el Rey se entiende en quanto equivalga á los servícios hechos en la guerra á expensas de ambos, pues si excede á estas, no se comunicará el exceso á la muger; cuya opinion es la veridica, y segura. (2) Pero lo que fuera de campaña ahorra de su sueldo, ya éste, ó no jubilado, ó retirado del servicio, y lo que con el compre, y lucre, sera comunicable á entrambos: lo primero, porque

proved by law 2, tit. 3, book 3, of the Fuero Real, which is the law 3. title 9, book 5, Recop. which says: "If the husband should gain anything by inheritance from father or mother, or other relative, or by gift of Lord, or of relations, or of friend, or in the service of the King, or from another who goes as his soldier, all that he gains goes to him as his own. And if it be gained in service without soldier at his expense and that of his wife, whatever he gains in this manner, all shall belong to the husband and to the wife; because as the expense is common to both, what they thus gain shall be common to both." this declaration is corroborated by law 5 of the same title and book. Prescribing that what is given by the King is understood in so far as it equals the services rendered in the war at the expense of both, as if it exceeds these, the excess will not be communicated to the wife; which opinion is correct and certain. But whatever he saves of

de ello no habla le ley: lo que esta no prohibe, es visto permitirlo; y lo prohibido en una cosa, se entiende permitido en todas las demas. (3) Y lo segundo porque este sueldo se la da por razon de alimentos, es fruto, ó emolumento del empleo que obtiene (como lo que ganan el Juez, Abogado, Escribano, y otros) y no donación regía de las que habla la ley, que regularmente son permanentes, y transmisibles, va consistan en utilidad. ó en honor, v. g. la heredad, titulo, senorio, oficio, privilegio, y otras cosas semejantes, quales tampoco son colacionables, como en él cap. 3. lib. 2. de esta segunda parte diré.

his salary outside of campaign, whether or not he be pensioned, or retired from the service, and whatever he purchases and gains therewith, shall be communicated to both: the first, because of that the law does not speak; and what it does not prohibit, is proper to allow; and what is prohibited in one thing, is understood to be permitted in all others. And second, because his salary is given to him for the purpose of support, it is fruit, or emolument of the employment which he obtains (the same as it is gained by the Judge. Lawyer, Notary, and others) and not regal gift of such as the law speaks, which ordinarily are permanent, and transmissible, whether they consist in profit, or in honor, e. q., the estate, title, lordship, office, privilege, and other similar things. which also are not collatable, as in chap. 3, book 2, of this second part I will explain.

22. Al modo que lo que el marido adquiere en la guerra, es comuni22. In the same manner as whatever the husband acquires in the war is

cable á la muger en el caso proquesto, lo tambien lo que gaña con los oficios de Juez, Abogado, Escribano, y otros semejantes, durante matrimonio; pues estos oficios son quasi castrenses, y lo que le producen, son frutos, los quales de qualquier calidad corresponden sean les por mitad, como diré en el cap. 5 de este libro () 5. pero su propiedad, que son los mismos oficios, ó la facultad de exercerlos, si el Rey los concede al marido, toca privativamente á este, y así nada llevará su muger (1).

El precio de la 23.finca, que antes de casarsé tenia vendida el marido con el pacto de retrovendiendo, y despues de casado recupera en virtud de este pacto. es igualmente comunicable á entrambos conyuges, mas no la finca; y así en la partición se ha de aplicar esta al marido, porque á ella ningun derecho compete á su muger, y si unicamente á la mitad del precio con que se recupero, como que salio del

communicable to the wife in the case proposed, so also is what he gains with the offices of Judge, Lawyer, Notary, and others similar, during the marriage; as these offices are quasi castrenses, and what ever they produce are fruits which, whatever their nature may be, belong to them in halves. as I will show in chap. 5 of this book 5, but their ownership, which are the offices themselves, or the exercise authority to them, if the King grants them to the husband, belong to him privately, and so the wife takes nothing therein.

23. The price of the land or property, which the husband had sold before marriage with stipulation for resale, and after marriage recovers by virtue of such stipulation, is also communicable to both consorts, but not the land or property itself; and in the partition the latter should be applied to husband, because the therein the wife has no right, but only to onehalf of the price with which it was redeemed, fundo comun: y en la adjudicación ha de observar el contador lo que dexo explicado en el n. 12. en quanto á la retraida por derecho de consanguinidad, (2) pues se atiende al princípo, y no al fin, quando este tiene consecuencia necesaria con aquel (3)

de-24.Aunque por antiquisimo recho no lucraba el marido los partos de las siervas dotales de su mujer, ni los de los rebaños. ó animales productivos, á menos que recibiese en si el peligro de su deterioro, ó perdida: (4) ni se dividian con el, antes bien pertenecian á su muger in solidum, ya naciesen constante matrimonio, ó despues del divorcio: (5) no obstante, hoy segun nuestras leves que estan en uso, los partos de las siervas de qualquiera de los conyuges son comunicables á entrambos, (1) porque se comprenden baxo del nombre generico de reditos, y estos ya procedan de los bienes de uno do los, ó de los de ambos, se les comunican indistintaas it came from the common fund; and in the adjudication the accountant should observe what I have explained in n. 12, as regards the recovery by right of consanguinity, as the principal and not the end is looked to, which the latter is a necessary consequence of the former.

24. Although by very ancient law the husband did not profit of the parturition of the dotal slaves of his wife, nor of the flocks, or productive animals, unless he received himself the risk of their deterioration or loss; nor were they divided with him, but pertained rather to his wife in solidum, whether born during the marriage or after divorce: nevertheless, at present according to our laws now in force, the increase of the slaves of either of the consorts are communicable between both. cause they are comprisedunder the generic names of incomes, and these whether proceeding from the properties of one of them or both, are communicated

mente, al modo que los frutos, á los quales se equiparan regularmente; (2) pues son como frutos industriales, y no naturales. (3) porque en ellos, y en su producción mas obra el cuidado, industría y solicitud, que le naturaleza, y no basta la virtud de este para ella; (4) y así como si la esclava se muere, se debe resarcir su precio de los gananciales: así tambien su parto se debe dividir. porque estos de qualquiera suerte que sean adquiridos constante matrimonio, se comunican regularmente á marido, y muger, y quien esta al provecho, debe estar al deño, y al contrario; ( ) y lo propio milita con los partos de los animales productivos.

25. \* \* \* \* \*

29. A la muger casada se comunica, transfiere en habito. y potencia el dominio. posesión revocable. V ficta de la mitad de los bienes, que constante matrimonio lucra, y adquiere con su marido: y despues que este fallece,

without distincthem tion, the same as the fruits, to which they are ordinarily compared; they are like industrial fruits, and not natural fruits, because in their production the care, industry and solicitude has more to do than nature. the virtue of which is not sufficient therefor: and thus if the slave dies, her price should be reduced from the ganancial: so also her production should be divided, because these by whatever means are acquired during the marriage, are communicated ordinarily to husband and wife, and whoever has the benefit should also suffer the damage, and vice versa; and the same applies with the production of the productive animals.

25. \* \* \* \* \*

29. To the married woman is communicated and transferred in custom and power, the revocable and fictitious dominion and possession of one-half of the properties which during marriage she acquires and gains with her husband;

se le tranfiere irrevocable, y efectivamente, de suerte que por su fallecimiento se constituve dueña absoluta en posesion, y propiedad de la mitad que dexe, (4) al modo que en los socios convencionales lo dispone la ley 47. al fin, tit. 28. Partid. 3, ibi: Nosotros decimos, que toda ganancia que qualquier dellos que el Señorio de ella pasa á los otros tambien, como si cada uno dellos la oviense fecha.

30. Pero el marido no necesita la dislución del matrimonio para constituirse real, y verdadero dueño de todos, pues constante este, tiene en el efecto su dominio irrevocable: y así los puede administrar, trocar, v no siendo castrenses, ni quasi castranses, vender, y enagenar á su arbitrio, cesante el doloso animo de defraudar á su muger, como se prueba de la ley 5. tit. 9. lib. 5. Recop. que dice: Y otrosi, que los bienes que fueren ganados, y mejorados, y multiplicados durante el matriand after the latter dies. it is transferred to her irrevocably and effectively, so that by his death she becomes constituted absolute owner in possession and property of one-half of what leaves, in the same manner that is provided for the conventional partners by law 47 at the end, title 28, Partid. 3. ibi (viz): "We declare further: that all gains that any of them make. that the ownership thereof passes to the others also, the same as if each of them had made it."

But the husband does not need the dissolution of the marriage to constitute himself the real and true owner of all, because during the existence of the marriage he has in fact his irrevocable dominion; and he may therefore administer, exchange (and not being castrenses nor quasi castrenses), sell and convey the same at his pleasure, in the absence of the deceitful intention of defrauding his wife, as is proved by law 5, title 9, Book 5, Recopilacion, which says: "And further, that

monio entre el marido, y la muger, que no fueren castrenses, ni casi castrenses, que los pueda enagenar el marido, durante el matrimonio, si quisiere, sin licencia, ni otorgamiento de su muger: y que el contrato de enagenamiento valga, salvo si fuere probado que se hizo cautelosamente por defraudar, ó damnificar á la muger. Por lo que mientras el marido vive, y no se disuelve su matrimonio, ó no hay divorcio, no debe decir la muger que tiene gananciales, ni impedirle el uso licito de los que adquiera á pretexto de que la ley la concede su mitad, porque esta concesión se entiende para los casos expresados, y no en otro, como algunas necias creen.

31. En consecuencia de lo exquesto se duda si la muger disuelto el matrimonio, podrá repetir, y cobrar de los deudores, y terceros poseedores sin

the properties which were gained, and improved, and multiplied during the marriage between the husband and the wife. which were not "castrenses nor quasi castrenses," that the husband may alienate the same, during the marriage, should be desire. without the license or authorization of his wife: and that the contract of alienation shall be valid. unless it be proved that it was made craftily to defraud or injure the wife." Therefore, while the husband lives, and the marriage is not dissolved, or there is no divorce, the wife should not say that she has gananciales, nor impede him in the lawful use of those he acquires, under the pretext that the law grant her her half, because this concession is understood to be for the cases mentioned, and not in others, as some ignorant persons believe.

31. In consequence of what has been stated it is doubted: if the wife, the marriage being dissolved, can claim and demand of the debtors, and

cesión del marido, ó de sus herederos la mitad de los gananciales v debitos que la toca? Y algunos (1) dicen que si la contenida esta muger con el marido en el instrumento, ó contrato, puede; mas no, sino lo está, porque en la sociedad universal, ó de todos los bienes no se transfieren los derechos sin la cesión, segun el Comun (2).

32 Pero otros (1) dicen indistintamente que no es necesaria la cesión, va este, ó no contenida la muger en el instrumento, y los bienes sean muebles, raices, derechos incorporeos, deudas, y acciones. Lo primero, porque si se constituye verdadera dueña por la parte que la toca, luego que muere su marido, es superfluo que pida lo que tiene, y el Derecho la concede: (2) pues por su mitad la competen todos los interdicios, ó remedios posesorios. (3)segundo, porque quando la lev divide algo entre varios, no es necesaria la third possessors without conveyance from husband, or from heirs, the half of the gananciales and debts which fall to her? And some say that if the wife is contained with the husband in the instrument, or contract, she may; but not if she is not (so contained) because in the universal partnership, or of all the properties, the rights are not transferred without the demand, according to the "Comun."

32. But others say indiscriminately that the demand is not necessary, whether or not the wife is contained in the instrument, and whether the properties are movables, real estate, incorporeal rights, debts, or actions. First, because if she is constituted as the true owner of the part which pertains to her, upon the death of her husband, it is superfluous for her to demand what he has, and the Law grants her; as for her half she is entitled to all the interdicts, or possessory remedies. Second, because

mutua cesión de unos á otros, y así el uno sin la del otro puede pedir su parte. (4) Lo tercero, porque al modo que el socio puede hacer por su parte, y denunciar la obra nueva: si la denuncia á nombre de los consocios, dando la competente caución, (5) podrá exigir tambien los debitos sin cesión. Lo quarto, porque la sociedad convencional se diferencia en muchas cosas de la convugal, como diré en el ( ) 4. de este capitulo. Lo quinto, porque segun el Derecho de las Partidas, (6) que debemos seguir, lo que un socio adquiere en la compañia universal. comunica á los demas sin cesión, como queda sentado en el num. 28. y siendolo, como lo es, la conyugal en quanto al lucro, se debe comunicar tambien sin ella. Y lo sexto porque en el nombre generico de bienes se incluyen, y comprehenden los derechos, y acciones: v la viuda del mismo modo adquiere dominio irrevocale en los corporeos que se la aplican, que en los incorporeos; y así como la división, y aplicación judicial de los dethe law divides anything among various persons, the mutual cession from some to others is not SO and necessary, without the cession the other can demand his part. Third, because in the same manner that the partner can do for his part, and denounce the new work: if he denounces in the name of copartners, giving the proper notice, he may also demand the debts without cession. Fourth, because the conventional partnership is different in many things from the conjugal; as I will explain in #4 of this chapter. Fifth: because according to the law of the Partidas, which we should follow, that which one partner acquires in the universal company, is communicated to the others without cession. as is set forth in the number 28, and the conjugal being universal, as it is, as regards the profits, it should also be communicated without the cession. And sixth: because in the generic name of (bienes) properties are included and comprised the rights and

rechos surte el efecto de que pueda pedirlos sin cesión: así tambien la legal, pues vale el argumento de la ley á la sentencia, y de esta á aquella. (7) Por cuyas razones, es indubitable que puede pedirla, sin necesitar la cesíon referida, por bastarle su adjudicación, con cuyo parecer me conformo.

33. No solo en el matrimonio legitimo, y verdadero se comunican á los casados los bienes que con su industría, y trabajo superlucran mientras dura, sino tambien los que durante el putativo adquieren, con que tengan buéna fé é ignorancia, y crean que es legitimo, y no de otra suerte; (1) y lo propio milita para con la dote, goza de iguales privilegios en este, que en aquel, si concurren

actions; and the widow in the same manner acquires the irrevocable dominion in the corporeals which are applied to her, as in the incorporeals; and just as the division and judicial application of the rights has the effect of her being able to demand them without cession; so also the legal, because the argument of the law is applicable to the judgment, and the latter to the former. For which reason. it is unquestionable that she demand same, without the cession referred to, because the adjudication will suffice her, with which opinion I concur.

33. Not alone in the legal and true marriage are the properties which they gain with their industry and work while it exists communicated to the married parties, but also such as they acquire during the putative marriage, provided that they have faith, and ignorance, and believe that it is legitimate, and not otherwise: and the same applies as regards the dotal, as it enjoys the same prividichas circunstancias.
(2) Pero la donacion pura, y simple entre ellos no vale, ni se confirma con su muerte en el matrimonio putativo: ni tampoco ha lugar la sucesió reciproca abintestato de uno á otro (3).

34.					*	
35.	*	*	*	*	*	
36.	*	*	*	*	•	
37.	*	*	*	*	*	

38. No constando que bienes entraron en su matrimonio el marido, y su primera muger, pero si los que querdaron por muerte de ésta, todos se reputan gananciales, como dexo sentado en en n. 4. y así se deben dividir por mitad entre ambos. Y aunque el marido ningunos hava entrado en el segundo matrimonio, se ha de aplicar á los hijos del primero la mitad de aquellas (hechas de ella las deducciones referidas) por ser pertenenciente á su madre: observandose para no perjudicar á la segunda, ni á los suyos

leges in the latter case as in the former, if said circumstances c on cur. But the pure and simple donation between them is not valid, nor is it confirmed by the death in the putative marriage; neither is the reciprocal succession ab intestate from one to the other applicable.

34.					
35.					
36.					
37.	*	•	*	*	*

It not appearing 38. properties were what taken into the marriage by the husband and his first wife, but only such as remained by the death of the latter, all are reputed as gananciales, as I have stated in n. 4, and they should therefore be divided in half between And even though both. the husband took nothing into the second marriage, there should be applied to the children of the first one-half of the former (making from deductions them the mentioned) as belonging to their mother; observing in order not to inen su dote, gananciales, y demas derechos, lo explicado en el enunciado cap. 3. de este libro en el segundo caso. jure the second wife, neither hers in her dower, gananciales, and other rights, what is explained in the said chap. 3, of this book in the second case.

#### APPENDIX VI.

MODERN STATUTES OF SPANISH-AMERICAN COUNTRIES

CONSTRUE THE LAW OF COMMUNITY PROPERTY IN

ACCORD WITH THE PROPOSITIONS HERETOFORE AD
VANCED.

The following sections are quoted from "Revised Statutes and Codes" of Porto Rico (1902): Title III.

Section 1282.—Persons who may be joined in matrimony may, before celebrating it, execute contracts stipulating the conditions for the conjugal partnership with regard to present and future property, without any other limitations than those mentioned in this Code.

In the absence of contracts relating to property, it shall be understood that the marriage has been contracted under the system of legal conjugal partnership.

Section 1310.—By virtue of the conjugal partnership, the earnings or profits indiscriminately obtained by either of the spouses during marriage shall belong to the husband and the wife, share and share alike upon the dissolution of the marriage.

Section 1313.—The conjugal partnership shall be governed by the rules of the articles of partnership in all that does not conflict with the express provision of this chapter.

Section 1316.—What constitutes property of conjugal partnership (recites them).

Section 1322.—All property of marriage presumed to be partnership until it is proven that it belongs to the husband or to the wife exclusively.

Section 1325.—Payment of debts contracted by the husband or wife before marriage shall not be borne by the partnership.

Section 1327.—The husband is the administrator of the conjugal partnership with the exception of what is prescribed in Secs. 81 and 82, Chap. VI, Title V of Book First of the Code.

Section 1328.—But the husband as administrator shall not have power to give, to sell and to bind for a consideration, the real estate of the conjugal partnership, without the express consent of the wife.

Section 1329.—Husband may dispose by will, of his half of the property of the conjugal partner-ship only.

Section 1342.—As to method of separation.

The following parts of codes are quoted from "Codigo Civil" (Civil Code) of the State of Chihuahua (Mexico) and from the Civil Code of Mexican Federal District and Territories, the latter as translated by J. P. Taylor (published by American Book and Printing Company, San Francisco). Inasmuch as both codes are exactly the same on the

propositions at hand, sections of the one are quoted in Spanish, and those that correspond in the other are set opposite as translated as aforesaid:

Chihuahua Code.

Federal District and Territories Code.

Chap. IV (of the administration of the properties of an absent married person).

Art. 648. A declaration of absence does not dissolve the bond of matrimony, but it interrupts the "conjugal association," except as provided in Art. 653.

Art. 650. The spouse present shall immediately receive his or her properties and the corresponding proceeds ("gananciales") up to the day on which the declaration of absence becomes executory. Such spouse can freely dispose of both.

Libro III. Titulo Decimo. Capitula V. (De La Administración de la sociedad legal.)

Art. 1895. El dominio y posesión de los bienes Chap. V (of the administration of the legal partnership).

Art. 2023. The ownership and possession of comunes reside en ambos conjuges mientras subsiste la sociedad.

Art. 1896. El marido puede enajenar y obligar á titulo oneroso los bienes muebles sin el consentimiento de la mujer.

Art. 1897. Los bienes raices pertenecientes al fondo social no pueden ser obligados ni enajenados de modo alguno por el marido, sin consentimiento de la mujer.

Art. 1901. Los conjuges no pueden disponer por testamento sino de su mitad de gananciales.

Art. 1902. Ninguna enajenación que de los bienes gananciales haga el marido en contraven-

the common property belong to both conjugal partners while the partnership subsists.

Art. 2024. The husband can alienate and obligate with an "onerous title" (for valuable consideration) the movable property without the consent of the wife.

Art. 2025. Real estate belonging to the social fund cannot be obligated nor alienated in any manner by the husband without the consent of the wife.

Art. 2026. In cases of unfounded opposition the consent of the wife may be supplied by judicial order, she being previously heard.

Art. 2029. The conjugal partners cannot dispose by will of more than their half of the common property ("gananciales").

Art. 2030. No alienation which the husband shall make of the "ganancial" property in

ción de la ley ó en fraude de la mujer, perjudicará á ésta ni á sus herederos.

Art. 1903. La mujer solo puede administrar con consentimiento del marido, ó en ausencia ó por impedimento de este. contravention of the law or in fraud of the wife shall prejudice the latter or her heirs.

Art. 2031. The wife can only administer by the consent of the husband or in the absence or through an impediment of the latter.

### APPENDIX VII.

### THOMPSON V. CRAGG, 24 TEXAS 599 605.

I think it proper to notice the position assumed, and the case of Panaud v. Jones, not because the question involved is an open one, but because the sources of the learning by which the soundness of the propositions asserted in the case referred to, must be tested, are not accessible to every member of the profession, and because, upon a question so fundamental in the Spanish jurisprudence in relation to community property, we are not willing that there should be any room for doubt, as to the correctness of the former decisions of this court.

The judge who delivered the opinion in the case of Panaud v. Jones, was misled by detached passages of commentators, which doubtless came under his consideration, disconnected from the great body of the Spanish law on the subject, with which the passages referred to are not at variance. He also misunderstood the scope and meaning of the 14th law of Toro. That law is calculated to mislead, when considered by itself. It is expressed in the following terms: "Mandamos que el marido y la muger, suelto el matrimonio, aunque casen segunda o tercera vez, o mas, pueden disponer libremente de los bienes multiplicados durante el primero, o segundo, o tercero matrimonio, aunque haya habido hijos de los tales matrimonios o algunos de ellos, durante los cuales matrimonios los dichos bienes se multiplicaron; como de los atros sus bienes propios que no hubiesen seido de ganancia, sin ser obligados a reservar a los tales hijos propriedad ni usufructo de los tales bienes;" which may be translated thus:

"We command that the husband and the wife, after the dissolution of the marriage, although they may marry a second or a third time, or more, may dispose freely of the property accumulated during the first, or second, or third marriage, although there may be children of such marriages, or of some of them, during which marriages the said property was accumulated, as of their other individual property which is not ganancial, without being under any obligation to reserve to such children either such property itself, or the usufruct of it."

This 14th law of Toro, means only, that upon the dissolution of the marriage, the surviving husband or wife may dispose of their portion of the ganancial property; but it does not mean that the surviving husband or wife could freely dispose of the whole of the ganancial property; and it was never so understood by any commentator, or by any judicial tribunal of the country in which it was promulgated.

The 14th law of Toro was declared with particular reference to other principles and provisions of the Spanish law, which are said by some of the Spanish commentators to have been inherited, and which obviously were inherited by the Spaniards, from the Romans. There were certain classes or kinds of property which were said to be acquired by the husband and wife by lucrative title (por titulo lucrativo), and in respect to which it was provided, that in the event of the dissolution of the marriage dur-

ing which said property was acquired, and the entrance of the survivor of the first marriage into a second marriage, such survivor was under obligation to reserve such property, so acquired by lucrative title during the first marriage, to the children of the first marriage. See Ley 14, tit. 2, lib. 4, of the Fuero Juzgo; see also Ley 13, of the same title, of the same book, of the same Fuero.

The 14th law of the second title of the 4th book of the Fuero Juzgo provided, that the mother should inherit jointly with the children, and in equal parts, the property of her husband, but in respect to the usufruct only and that in case she contracted a second marriage, she should lose the usufruct.

The 13th law of the same title, of the same book, of the Fuero Juzgo provided, that when one of the parents died, the survivor acquired the estate from the children, in respect to the usufruct only. Ley 1, tit. 2, lib. 3, del Fuero Real provided, that the mother is obliged to reserve for her children, three-fourths (las tres partes), of the arras which she received from her husband; and if she had children of two marriages, the children of each marriage should inherit the arras received from their respective fathers. See also Ley 23, tit. 11, partida 4; and Ley 26, tit. 13, partida 5. And also the 19th, 20th, 21st, 22d, 24th, and 25th paragraphs of the Commentary of Llamas on the 15th law of Toro.

The arras of the wife, or that property given to the woman by the man, in consideration of the marriage; the donations propter nuptias, or that property which either gave to the other, freely, and without condition; the dower which the wife brought to the husband; and inheritances, under certain circumstances, by either the husband or wife, from the children of the marriage; constitute the property acquired by lucrative title, which was to be reserved for the children of the marriage, by and during which it was acquired. The 15th law of Toro provided, that in all cases in which women marrying a second time, were under obligations to reserve to the children of the first marriage the property received from the first husband, or inherited from the children of the first marriage,- in the like cases, men who shall marry a second or third time, shall be under obligation to reserve the property acquired by the first or second marriage to the children of that marriage; and that the same rules, in respect to women who married a second time, should apply to men who married a second or third time.

The Commentary of Llamas on this 15th law of Toro, in which he quotes the opinions and expressions of many other commentators, show in the clearest manner possible, the reasons and principles in which the 14th law of Toro had its origin; and the substance of the whole is, that inasmuch as the community or ganancial property, is acquired by onerous title, as distinguished from lucrative title, the surviving husband or wife shall have the power freely to dispose of their portion of such ganancial property, without being under any obligation to reserve

it for the children of the marriage during which it was acquired, in the same manner that they were required to reserve property acquired by lucrative title to the children of the marriage by which it was acquired. If the 14th law of Toro had not been promulgated with particular reference to the other laws, which required a surviving husband or wife, contracting a second marriage, to reserve to the children of the first marriage, the property acquired by such marriage, by lucrative title, then it would have made no mention of second or third marriages. If the object of this law was to endow the surviving husband or wife with power to sell the whole of the ganancial property acquired during the marriage, then nothing need have been said about second or third marriages.

The 16th law of Toro provides, that where the husband shall bestow or bequeath to his wife anything, at the time of his death or in his testament, the thing so bequeathed shall not be charged to the wife, in the part which she is to have of the ganancial property.

In their commentaries upon this law, the Spanish authors discuss at great length the nature and extent of the wife's title or property, in the half of the acquisitions made during the marriage. Much criticism is lavished upon the words used in Ley 1, tit. 3, lib. 3, del Fuero Real, where it is said, "Toda cosa que el marido y muger ganaren o compraren, estando de consumo, hayan lo ambos por medio."

Some of the commentators contend that the verb hayan, is used in the sense of vesting actual property or dominion in the thing spoken of. Others deny that the word has so large a signification; but all agree that upon the dissolution of the marriage by the death of one of the spouses, the ganancial property vested absolutely, one half in the survivor, and the other half in the heirs of the deceased partner. See Commentaries of Llamas and Gomez on the 16th law of Toro.

Section xiii. of the 5th title of Febrero Reformado, treats of the rights and liabilities appertaining to the conjugal partnership. In paragraph 410, it is said, "The power of alienation which the laws concede to the husband, only continues during the marriage. The husband is prohibited from disposing, by testament, of that portion of the ganancial property belonging to the wife."

The 412th paragraph of the same section, speaking of the liabilities of the conjugal partnership, says, that they may be divided into two classes: first, those charges which arise during the existence of the partnership, and secondly, those relating to the obligations which ought to be discharged out of the effects of the partnership, after its dissolution. In the first class are enumerated the necessary expenses of maintaining the family and the household, the dower given to the daughters, and the donations propter nuptias, made to the sons, etc. It is then said, that after the dissolution of the partnership,

the common effects ought to be chargeable, in the opinion of some, with dower and donations of the same kind, made by one of the spouses after the death of the other; but this proposition is denied, and the reason given for denying its soundness is, that the partnership being dissolved by the death of one of the spouses, all its consequences cease. in conclusion it is said, "The only charge to which the ganancial property is subject, after the death of one of the spouses, is the payment of the debts contracted during the matrimony, by either of them, provided they originated in the business of the partnership itself, and not in the private business of one of the partners." In paragraph 406 of the same work, section 12, the ganancial property, or what is ganancial property, is particularly defined. And afterwards, in the same work, in treating of the division of the ganancial property, between the surviving spouse and the heirs of the deceased, it is said in paragraph 2396, section 1, title xxxiii., "According to this law," referring to Ley 1, tit. 4, lib. 10, of the Novissima Recop., "all the property of which we spoke in paragraph 406, which is ganancial, ought to be divided between the survivor and the heirs of the deceased spouse."

In the Instituciones del Derecho civil de Castilla, by Asso and Manuél, in treating of the ganancial property, and the rights of the spouses in respect to it, those learned authors say, on page 62, chap. 5, tit. vii., libro primero, "upon the dissolution of the marriage, the survivor may dispose of that part of the ganancial property which belongs to him or her, without being obliged to reserve it for the children;" and what is very conclusive upon the question under discussion is, that the authority cited by Asso and Manuél for the proposition just quoted from them, is Ley 6, tit. 9, lib. 5, of the Recopilacion, which is also the 14th law of Toro, upon which the doctrine asserted in the case of Panaud v. Jones, 1 Cal. 488, was mainly rested.

The supreme court of Louisiana was long distinguished for the eminent abilities of its judges, who made the most profound investigations into the whole learning of the Spanish law, and who explored thoroughly, every kindred system of jurisprudence, aided, too, by counsel, whose fame as civilians extended throughout the whole country. The wonder would indeed be great, if that court, administering the Spanish law for very nearly half a century, should have remained all the while ignorant of one of its most important provisions, respecting the partnership which exists between husband and wife, as to their common property. That court has, time and again, decided the question under consideration, and the principle has always been asserted and never questioned, that the community of acquests and gains, ceases to exist at the moment of the death of one of the partners, with all the legal effects resulting from it; that each party to the community is seized of one undivided half of the property composing the mass, and that the survivor cannot validly alienate the share not belonging to him. In the case of Broussard v. Bernard, 7 Louisiana, 216, the court said, "That a community of acquests and gains, as such, continues after the death of one of the partners, with all the legal effects resulting from such a relation, with authority in the husband, if he should survive, to be still regarded as the head of the community, with power to bind the common property by new contracts, and to alienate it without restraint, is a proposition so repugnant to all our notions of a community, and so subversive of first principles, that it cannot be for a moment admitted."

But I need not pursue this subject further. If the question was one about which there could be any doubt, or if the former decisions of this court needed any vindication it would be matter of regret that the late chief justice was not here to perform a service to which his abilities and learning were so fully adequate. My only object has been to express our confidence in the correctness of the former decisions of the court, and to make such references to sources of information, as will enable those who may desire to investigate these questions for themselves, to do so. I am quite conscious of my want of ability and learning in the Spanish law to present the subject in a full and clear light.

The judgment of the court is reversed, and the cause remanded for further proceedings in conformity with this opinion. Reversed and remanded.

## APPENDIX VIII.

Translations of the Spanish Laws and Legal Literature photostats of which appear in Appendix XI.

Photostat page 1 reproduces the title page of Vol. I of the Alcubilla "Ancient Codes of Spain", (Madrid, 1885). Photostat pages 2 and 3 were obtained from that publication.

Photostat page 2 reproduces law 17, of title 2, of book IV of the Fuero Juzgo. In the Latin version of this code (Forum Judicum) the corresponding law is numbered 16, in title 2, book IV; the following is the translation made by S. P. Scott from the Latin, and published by the Boston Book Co., 1910: Book IV, Title II.

XVI. CONCERNING SUCH PROPERTY AS THE HUSBAND AND WIFE TOGETHER HAVE ACCUMULATED DURING THEIR MARRIED LIFE.

When persons of equal rank marry one another, and, while living together, either increase or waste their property, where one is more wealthy than the other; they shall share in common the gains and losses, in proportion to the amount which each one holds. If the value of their possessions is the same, neither has a right to assume superiority over the

other. For, it is not unusual, where such property is equal in amount, for one party, in some way, to take advantage of the other. And if it should be evident that the possessions of one exceed those of the other in value, as above stated, there shall be an apportionment of it made showing what either shall have the right to claim after the death of the other, and what either shall have a right to dispose of to his or her children, or to heirs, or in any other way that may be desired. This provision shall apply to, and be observed in, all cases relating to the estates of both husbands and wives. The distribution and possession of other property concerning which an agreement in writing has been entered into by both parties, shall be held and enjoyed by them according to the terms of that written agreement. If the husband should acquire any property, either from strangers, or during any public expedition, or by the donation of the king, or of a patron, or of any of his friends, his children or heirs shall have a right to claim it, and shall have absolute power to dispose of it as they wish. The same rule shall apply to women who have received gifts from any source.

Photostat page 3 reproduces Title 3 of Book 3 of the Fuero Real. The three laws in this title correspond to the first three laws in Title 4, Book X of the Novisima Recopilacion, and will be found translated in Appendix II.

Photostat pages 4, 5 and 6 exhibit a reduction of Book 5, Title 9 of the Nueva Recopilacion of 1567, as it appears in a sixteenth century publication, the title page of which is missing. Of the eleven laws contained in said Book V, Title IX, the 8th (being the 53rd law of Toro) is carried into Title 3, Book 10 of the Novisima Recopilacion, and the other ten laws are found in Title 4, Book 10 of said last mentioned collection.

Photostat pages 7, 8, 9 and 10 exhibit a reduction of the title page of the fourth volume of an edition of the Novisima Recopilacion of 1805, (printed in Paris in 1846) and of the three pages containing Book X, Title IV. The thirteen laws in said title are found translated in Appendix II to this brief.

Photostat pages 15, 16 and 17 exhibit the title page and pages 256 and 257 of the first book of the Second Part of the Library for Scriveners by Joseph Febrero (Madrid, 1790). Translation and comment are found in the brief.

Photostat pages 18, 19 and 20 exhibit the title page and pages 164 and 165 of Parte Segunda, Tomo III, of the 5th edition of the Febrero Library for

Scriveners, by Joseph M. Gutierrez (Madrid, 1819). Translation and comment are found in the brief.

Photostat pages 21 and 22 exhibit the title page and page 81 of Tapia's Febrero, newly condensed by an unknown author, published at Madrid, 1845, by the successors of the widow *Calleja* and Sons. The following is a translation of paragraphs 12, 13 and 14, including the sentence unfinished at the foot of page 81:

During the marriage the wife only has the dominion in ownership and the revocable possession of the ganancial properties, and until the husband dies she is not constituted the absolute mistress in proprietorship and possession of the half which belongs to her; consequently, while the husband is living, she cannot dispose of any amount, however small it may be, of ganancial property, without the license of her husband. On the contrary, he, during the marriage, is the veritable master of the ganancial properties (1); and so he can exchange, sell and alienate them at his discretion, not meditating fraud or deceitful intent to defraud the wife (Law 5, Title 4, Book X, Novisima Recopilacion). The authors doubt if he can also donate the ganancial properties and Febrero is of the opinion that the donation will be valid if it be made to his relatives, or so moderate as not to cause grave prejudice to the

<sup>1.</sup> Thus speaks Febrero and various other authors; but in our opinion the husband and the wife have the possession and the dominion over the ganancial properties, as two conductions; although the husband is the one who administers them on account of being the chief of the conjugal partnership.

wife: the reason on which this is based is that the husband has more work in acquiring the ganancial properties than the wife in conserving them.

"13. Not only in the legitimate and veritable marriage are the ganancial properties communicated to the consorts, but also in the reputed or supposedly legitimate, although presently it does not so result; because they acted in good faith.

"14. Whenever by the known fault of the husband, the properties of the conjugal partnership are notably diminished, or are burdened with an annuity, guaranty or otherwise, the husband must pay the same from his separate property; since the loss which one partner causes by his fault to the other is not made good with that which his industry acquires, so also because according to law, the wife is not bound by the guaranty given by the husband (Law 2, Title 11, Book X Novisima Recopilacion)."

Photostat pages 23 and 24 exhibit the title page and page 71 of the first volume of Sala Novisimo, by Joaquin Romero (2nd edition, Madrid).

The following is a translation of paragraph Number 1:

"One can, without doubt, designate as the most famous civil effect of marriage in Spain, an effect unknown in the Roman laws, the acquisition by both consorts equally of that which each one of them may gain by onerous title during marriage, which can be called the right of gananciales. One can hardly give an exact definition of what they are, on account of the various classes of properties, which they comprise.

It would not be inappropriate to say that gananciales are 'that part of the properties gained during the marriage, which, under the laws, belongs equally to the two consorts'."

Comment. The author of Sala Novisimo, being at a loss for a concise definition, utilizes an essential element for that purpose.

Photostat pages 25, 26 and 27 exhibit the title page and pages 10 and 11 of *El Litigante Instruido*, or the Law stated within the capacity of everybody, a compendium of the work of John Sala, as taught in the Universities of Spain, published in Mexico in 1846. The following is a translation of the questions (preguntas) and answers (respuestas) relating to dominion, commencing with the last question on page 10:

"Q. To whom belongs the dominion of the properties acquired during the marriage?

"A. It is common equally to the husband and the wife, without regard to whether one has brought more capital to the marriage than the other. (Laws 1, 3 and 4 of said Title 4, Book X, Novisima Recopilacion.)

"Q. And who exercises this dominion during

the marriage?

"A. The husband, for which reason he can alienate these properties without the consent of the wife, unless it is proved to have been made with intent to defraud or prejudice her. (Law 5 of said Title 4.)

"Q. Can the husband dispose in his testament of his wife's half of the gananciales?

"A. No, sir: the ownership and usufruct belong to her: she can make disposition thereof, just as of her other free properties, without obligation to reserve anything for her children. (Law 6 of said Title 4.)

"Q. And if the husband bequeath anything

to the wife?

"A. She will take the legacy without diminution of her half of the gananciales. (Law 8 of said Title 4.)"

Photostat pages 28 and 29 exhibit the title page and page 60, of Volume III of Sala Mexicano, published in the City of Mexico. The following is a translation of paragraph 28, to and including the last complete sentence on page 60:

"The basic dominion of the properties of the society exists in both consorts, and not in either one of them (Laws 1 and 2, Title 9, Book V, Recopilacion of 1567; Laws 1 and 4, Title 4, Book X, Novisima Recopilacion of 1805); but in exercise it is in the husband who can dispose of said properties even against the wish of the wife, provided it is not done with intent to prejudice her (Law 5 above mentioned): and from this the expounders (Garcia de conjug. cuest. n. 66; Ayora holds a contrary opinion) gather that, provided he does not perpetrate a fraud, even the alienation which prejudices the wife, as when the husband may be a gambler or vicious, will be valid. Some (Gomez and others) say that he can give the ganancial property away: others (Matienzo and those whom he cites) say no; others (Molina de hisp. primog. Book 2, Chapter 10; Gutierrez, practical questions, Book 2, Question 121) that he can

make donations moderately and for a good reason."

Photostat pages 30 and 31 exhibit the title page and page 111 of Volume II of the Institutes of the Royal Law of Spain, by Joseph M. Alvarez (2nd ed. Madrid, 1839).

In this work, the author says that property acquired during the marriage belongs to both consorts, excepting \* \* \*

"The 5th, when the husband alienates, during the marriage, some or all of the gananciales, which he can do without the consent or license of his wife, not being military or quasi military, as she does not have the use of her dominion until her husband dies. (Law 5, Title 9, Book V of the Recopilacion of 1567.) But if it be proven that the alienation is made with fraudulent intent to damage the wife, her interest in them will continue, since she has a right of action to demand her half, upon proof of the fraud practiced by the husband."

Photostat pages 32 to 39 exhibit the title page and pages 256 to 262 of the first volume of the Elements of the Civil and Criminal Law of Spain, by Peter Gomez and John M. Montalban (4th ed. Madrid, 1851). The following is a translation of the entire seven subdivisions of section VII:

# §VII.

LEGAL SOCIETY OF THE CONSORTS.

1. The legal society proceeding from matrimony,

unknown by the Romans, who made the husband the master of the gains acquired during the marriage, was introduced by the Visigoths at the time of the conquest. The wives participating in the hardships, expeditions and combats of their husbands, it was believed that they should also participate in the prizes taken from the enemy. The Forum Judicum raised the custom to a law, and extended it to every class of acquisitions; and since that time there is known among us the legal society, which has since experienced some notable variations.\(^1\) Regarding it as a stimulus to excite the vigilance, industry and carefulness of the consorts for their reciprocal interests, its utility and convenience are indisputable.

Footnote 1: Law 17, title 2, Book IV, of the Fuero-Juzgo divides between the spouses, in proportion to what each one has brought, the gananciales made during the marriage: subsequent legislation makes the division by halves, without regarding the goods brought.

Catalonia. The legal partnership of the consorts is not known in Catalonia: only in the district of Tarragona by customary law they are accustomed to agree that the husband associates with the wife for acquisitions and improvements.

Navarra. In Navarra, wherein is in force the legal society between the consorts, at times other persons besides them are admitted. This happens when the surviving consort contracts a second marriage without having made partition of the property or delivered to the heirs of the decedent the part which belongs to them, in which case the said heirs are entitled to a third part of what is acquired in the second marriage, the other two parts remaining for the consorts: law 2, title X, book III of the Nov. Recop. of the laws of Navarra, and law 50 of the Cortes of 1763 and 1766. And it is the common opinion founded in the principles of justice and equity, that if there are losses in this second marriage, the heirs of the first will not be participants, there being delivered to them integrally everything that belongs to them. In order that the laws shall not be pewerless, and be evaded by means of a renunciation made in favor of the consort by the one who marries two or more times, he is prohibited from renouncing the gains: (number 7 of the law 48 of the Cortes of 1765 and 1766.)

- Mode of Formation. The tacit consent which is assumed from the consorts in the non-renunciation of this society, originates it: consequently, it can be said that the marriage alone is required for its formation. But this must be understood when the marriage is followed by its natural consequence, namely: that the person and the interests of the spouses are communicated, because then alone exist the presumption and the cause which by law establish the community of gains: so, in our opinion, the society does not commence in marriages contracted by power of attorney until it is ratified and the wife commences to live with the husband: for this the law (1, title 4, book X of the Novisima Recopilacion) says "being together." When contracting matrimony the wife can renounce the gains therein acquired, and in this case she will not be obliged to pay any part of the debts contracted during the conjugal union (law 9, title 4, Book X of the Novisima Recopilacion).
  - 3. Things comprised in the legal society. There belong to this society and are called gananciales (Navarra: The law of Navarra calls "conquests" what are given the name "gananciales" in Castille):
  - 1st. All the properties which during the marriage either of the consorts acquires by onerous title (law 4, title 4, book X of the Nov. Rec.; Aragon: the same results in Aragon—Observ. 53, de jure dot.).

2nd. The cost of the improvements made during the marriage in the common properties and in the separate properties of each consort (laws 3 and 9, title IV, book III of the Fuero Real; Aragon: If the husband constructs or plants a vineyard or olive grove in the property of the wife, or makes other improvements, he will take the fourth part of the property, or rather the half of the work or improvement which he made—Observ. 12 de jure dot.).

3rd. What the husband gains in war, carried on at the cost of himself and of his wife (law 2, title 4, book X of the Nov. Rec.).

4th. The fruits and rentals of the properties brought to the marriage and of those acquired thereafter, whether by onerous or lucrative title (law 2 of the same title and book). And regarding this we must advise that upon the death of one of the consorts prior to the picking of the fruits, if these already appear they are divided between the survivor and the heirs of the decedent, and if they do not appear, they belong to the owner of the real estate, with obligation to refund the expenses incurred in its cultivation. Doctrine which controls not only concerning trees and vines, since in the grainfields, although the grain may not appear until after the death, it must be divided by halves (law 10, title 4, book III of the Fuero Real).

5th. The results of the industry, office or profession which either of the consorts exercises (law 5, title 4, book X of the Nov. Rec.).

4. The things which are comprised within this society being enumerated, it does not appear necessary to indicate those which are not: nevertheless, as some laws designate them, we will give succintly the extract of their contents. The following are not considered as gains, but belong exclusively to one alone of the consorts:

1st. The royal donations made to one of the two (the same law 5).

2nd. What the husband or the wife acquire by lucrative title (laws 2 and 4 of the same title and book; the same happens in Aragon—Observ. 53, de jure dot.).

3rd. The military properties and royal offices not acquired at the cost of both (law 5, title 4, book X of the Nov. Rec.).

4th. Whatever either one proves to have brought to the marriage (laws 3 and 4 of the same title and book; Aragon—The same takes place in Aragon, Observ. 23, de jure dot.; according to the Fuero of the Bailio, conceded to the town of Albuquerque, Jerez of the horsemen and other localities, there are communicated all the properties which the consorts bring to the marriage, and those which they acquire by whatsoever title), and the increment solely caused by nature.

5th. The buildings constructed on the land of one of the two, which continue in the dominion of that one with the obligation to pay one-half of what it cost to construct, to the other consort or to his or her heirs (law 9, title IV, book III of the Fuero Real): doctrine founded in the general principles which rule with respect to buildings constructed by one on the land of another.

6th. The mutations of the properties belonging to one alone, since the thing acquired would belong to the one who was the owner of what was given therefor: the same result follows if a property be sold, and with its price another property be purchased, because the things obtained by exchange or purchase in this manner replace those which formerly belonged especially to one. It is not necessary to state that in these cases, although the acquisitions belong to one, the income therefrom belongs to both consorts (law 11, title IV, book III of the Fuero Real).

5. Administration. While the conjugal society endures, the ganancial properties belong in common to both consorts (Aragon—If the husband absents himself without appointing an agent, the wife has the administration of the properties; Observ. 27, de jure dot.): but the husband has not only the administration (Navarra), but also the power to dispose of them. Consequently he can alienate them and deal with them as appears advisable, subject to one limitation, which is, that he do not proceed with intent to defraud or prejudice his wife. Upon the dissolution of the marriage, these rights are extin-

guished, and each consort or his or her heirs acquire the dominion and the administration of one-half of the gananciales, provided that the wife has not renounced them at some time, or that being a widow she has not led a relaxed and dissolute life, in which case she would lose them even after having taken possession of them (law 4, title 3, book X of the Novisima Recopilacion). The legacies bequeathed by the husband to the wife are not charged against her part of the gananciales (law 8, title 4, book X).

6. Burdens of this society. The burdens of the legal society of gananciales are:

1st. The payment of the obligations which rest on the husband as chief of the family while the marriage lasts.

2nd. The debts contracted during the marriage, although contracted by the husband alone, in order to pay the obligations of the conjugal partnership; but not those of either consort prior to marriage, because only their separate properties are obligated for these (law 14, title 20, book III of the Fuero Real; and law 207 of the Estilo).

3rd. The dowries and donations on account of marriage given by the consorts to one of their children, which is true even in the case where the father alone has made them during the marriage (law 4, title 4, book X of the Nov. Rec.). The opinion which many interpreters hold that payment is also made from the gananciales when the promise is made after

the death of one of the consorts, does not have, in our judgment, any solid foundation, because the statutory society is then already completely dissolved.

7. Modes of termination. This partnership ends:

By the renunciation made by the wife while the marriage exists (law 9, title 4, Liber X of the Novisima Recopilacion. By the renunciation which she makes before or after the marriage, the wife also loses the right to one-half of the gananciales; but one cannot say that there is concluded a society which in the first case does not exist at all, and which in the second has already terminated. Some writers, and among others Gregorio Lopez, contend that the wife during the marriage cannot renounce the gananciales, for the reason that this renunciation amounts to a donation, and that donations are prohibited between consorts. Nevertheless, the majority of Spanish jurists follow the opinion which we adopt, and among others Gomez, Matienzo, Palacios Rubios, Covarrubias and Llamas, giving as the reason that this renunciation is not one of those in which, in the act, the one makes himself poorer and the other richer, because no one knows whether there will or will not be gananciales until the dissolution of the marriage).

2nd. By the death of one of the consorts. Some consider that even after the death of the husband or the wife, this society can continue in force, by

virtue of a contract between the survivor and the heirs of the decedent; notable error, as we believe, and which confuses the legal society which has definitely ended with a conventional one which can be commenced.

3rd. By divorce (law 1, title 4, book X of the Novisima Recopilacion), because in this case, in the same manner as in the preceding, the cause of the society has ceased.

Photostat pages 52, 53 and 54 exhibit the decision of the Superior Court of the Mexican Federal District, rendered May 25th, 1904, in the case of Garcia v. Estate of L. Contreras, as reported in the Diario de Jurisprudencia, Tomo II, May to August, 1904. The following is a translation (page 667): Telesfora Garcia v. Estate of L. Contreras. Ordinary proceeding concerning the liquidation of the statutory society.

## SUMMARY.

Records of a church marriage. The records made before the establishment of the Civil Registry, are public documents and, as such, merit full faith.

(page 668)

Surviving consort. Is entitled, by reason of gananciales, to half of the properties acquired during the marriage with the deceased consort.

Dispositions concerning the statutory society. Those contained in the Civil Code are applicable to

the marriages contracted prior to its effective date, because they concern public law.

Statutory society. The principles established regarding this subject, by the antique legislation, are equal to those fixed by the legislation now in force.

Sine actione agis. This exception is not one of those recognized and authorized by the law; explaining that its object is not to destroy or delay the action, but simply to deny the claim.

Costs. Those of both trials are charged against the litigant ordered by two judgments conforming in all respects.

Mexico, May 25, 1904.

Upon an inspection of the pleadings of the ordinary action maintained by the Señora Telésfora García, represented by lawyer A. R. Pedrueza, against the Estate of Señor Lazaro Contreras, represented by the executrix Gregoria Montes de Oca, all residents of this city, over the liquidation of the statutory society originating in the marriage celebrated by said plaintiff with the decedent.

Resulting: first: that the Señora Garcia asserted in the complaint that she contracted a church marriage with L. Contreras, Jany. 5th, 1857, in the parish of St. Stephen, District of Otumba, State of Mexico, from which marriage came six children;

That, at the time of the celebration of the marriage, neither of the consorts had any property, Contreras having thereafter acquired 2 houses, one at No. 1 Peñon Street, and the other in the Second Street of Granada, which was numbered 3:

That her husband contracted illicit relations with Señora Gregoria Montes de Oca, at whose side he was taken sick and died, executing his testament April 9, 1896, and in which he named as heirs the children of that union, and only left a small alimentary pension to his legitimate children;

And by the same complaint she demanded of the estate of her deceased husband, the liquidation of the statutory society which existed between them by virtue of the marriage, and that judgment be pronounced against the estate for the payment of the gananciales which belonged to her, that is, the half of the properties which appear listed in the inventory.

Resulting, second: that a copy of the complaint being served, the Señora Montes de Oca answered, denying it, for the reason that the precepts applicable to the case are not those of the Civil Code, but those of the ancient legislation, and opposed the exception sine actione agis.

The dilatory plea opened: the defendant did not offer any proof, and the plaintiff produced the following proofs:

I. Documentary, consisting of the certified copy of the testament and the church marriage certificate, presented with the complaint; the proof of the instrument of the purchase of the house No. 1 Peñon Street; a Resolution of the Council relative to the designation of numbers for the different houses of the First Street of Granada, among them the No. 3:

 Judicial declaration, stating the points which Señora Garcia declared.

Resulting, third, that on Nov. 10th last, the Judge pronounced the sentence, part of which says:

- "I. The plaintiff proved with the respective documents which accompanied her complaint, the claim therein alleged.
  - II. The defendant did not sustain her exception.
- III. Consequently, the Estate was ordered, to prepare, within 8 days, the liquidation of the statutory society which existed between the decedent and Señora Garcia, and to pay to her, as and for gananciales, within the third day of the termination of the said liquidation, the half of the value of the properties.

IV. The defendant was condemned to pay the costs incurred in this instance.

Resulting, fourth: that the Señora Montes de Oca took an appeal from that decision, which has proceeded in this Court, the trial having taken place the 21st day of the current month, with the assistance only of the lawyer Ramos Pedrueza.

Considering, first: that according to the documents presented by Señora Garcia, which pertaining to the class of public ones, under articles 439½ and 553 of the Code of Procedure, merit full faith, it is completely demonstrated that the said senora contracted a church marriage on January 15, 1857, with Lazaro Contreras, and that he acquired the said houses during the marriage. Consequently, the right, or rather, the action exercised by Señora Garcia in this proceeding, is demonstrated, and that one-half of the properties acquired during her marriage by ganancial title belongs to her, in conformity with articles 2008 and 2029 of the Civil Code.

Considering, second: that it is not correct, as asserted by the defendant, that the application of said precepts to the present case gives them a retroactive effect, and that one should only apply those of our antique legislation; because laying aside the fact that the laws which regulate the conjugal society, so far as they refer to those cases in which the consorts make no agreement with reference thereto, are public laws, and therefore can and must apply to the marriages contracted before their effective date, it must be kept in mind that our ancient legislation established the same principles.

In effect, law 1, title 3, book 3, of the Fuero Real, says:

"Everything that the husband and wife gain or purchase being together, let them both have it equally."

and the laws 1 and 3, title 4, book 10, of the Novisima Recopilacion, say:

"Notwithstanding that the husband may have more than the wife, or the wife more than the husband, either in realty or personalty, the fruits shall be common to both equally."

and the law 14 of Toro declares that the wife, upon the death of the husband, acquires the proprietorship and the full possession and the administration of the half of the gains made in the marriage, and can dispose of them freely.

Considering, third: that as a consequence of what has been explained, as to whether there is presently applicable the antique legislation, in force when the Señora Garcia was united in marriage with Señor Contreras, or the precepts of the Civil Code, always it will result that she has the same rights over the goods acquired during this marriage, and for the same reason that she has a right of action to require of the heirs of her consort the payment of the half of the gananciales, and the obligation on them to proceed with the liquidation of the statutory society and the delivery of the gananciales, an obligation which is imposed by arts. 2056 and following of said Code.

Considering, fourth: that the exception sine actione agis does not have the appropriate character of the exceptions recognized and authorized by the law, because it does not comply with the object which the law attributes to them, as it is not directed to the destruction or delay of the action brought by the plaintiff (art. 26, Code of Proced-

ure), but only imports the negative of the claim, and for the same reason, it is not necessary to enquire if the claim has been examined by the executrix of the estate in question.

Considering, fifth, from what has been explained that it follows that the decision appealed from is correct, and therefore, that it should be affirmed, and the appellant compelled to pay the costs caused in the two hearings of the Court, according to article 1431/4 of the Code of Procedure.

Wherefore, in accordance with the rules of law cited, the decision appealed from is affirmed, and it is ordered:

First. The Señora T. Garcia has proved the claim asserted in this action.

Second. Consequently, the estate of Lazaro Contreras is ordered to proceed with the liquidation of the statutory society which existed between said Señora and the Señor Contreras, and to deliver to her the portion of the gananciales which therein results in her favor.

Third. The Señora Montes de Oca, as executrix of the said estate, is ordered to pay the costs incurred in the two court hearings.

Be it known, etc.

### APPENDIX IX.

# EXCERPTS FROM FRENCH LAW BOOKS RELATING TO THE COMMUNITY.

Translated excerpt from Aubry and Rau, Du Contrat de Mariage, §497:

The first lineaments of this community are encountered in the ancient germanic customs.

\* \* \* It would be difficult to determine precisely the diverse causes under the influence of which these first elements were developed and transformed.

Photo pages Nos. 40, 41 and 42 reproduce the title page and paragraphs 467 to 473 of the Treatise on the Community by Robert Joseph Pothier (1699-1772) with foot-notes by M. Bugnet (2nd edition, Paris, 1861).

Thus are shown on the same page, Pothier's idea of the community property system prior to the Code Napoleon of 1804, and Bugnet's annotation subsequent thereto.

Translation of the first axiom of Pothier, paragraph 467, and of Bugnet's annotation:

First axiom. The husband, as chief of the community, is reputed sole lord of the properties of the community, as long as the community endures, and he can dispose of them at his pleasure, without the consent of his wife.

Annotation. Although the husband has very extensive powers over the properties of the community, it is not now exact to say that he is sole lord of them and that he can dispose of them at his pleasure; he is no more than an administrator.

Translation of the first paragraph of paragraph 468 of Pothier:

We have seen at the commencement of this Treatise, that the community of properties which is established, maybe by the statute, maybe by contract, between the consorts by marriage, is to some extent in habitu, rather than in actu, and that the husband, as long as the community endures, is, in his capacity of chief of this community, reputed to some extent sole lord of the properties of which the community is composed; because he has the right, in this capacity, to dispose at his pleasure, not only of his share, but of that of his wife, without being accountable to her. "The husband," says the custom of Paris, in the article 225, "is lord of the personalty and of the realty acquisitions by him made during the marriage of him and his wife."

# Translation of Pothier, paragraph 472:

Almost all the customs have in this respect the same disposition as that of Paris. There are nevertheless some customs which regard the husband as only a simple administrator cum libera, and which consequently permit the husband to sell, exchange and mortgage the properties of the community; but which do not permit him to make a gift inter vivos, if the gift is not of his share alone. Such are the customs of Anjou, art. 289; of Maine, art. 304; of Lodunois, chap. 26, art. 6.

The custom of Saintonge, tit. 8, art. 68, excepts from the power which it gives to the husband to dispose without his wife of the personalty and acquisitions, those which have been made by the husband and his wife, operating together.

In other customs, there are excepted from the husband's power, the acquisitions which have been made by the wife and by her industry. Bayonne, tit. 9, art. 29; Labour, tit. 9, art. 2.

Bugnet, in commenting on the foregoing paragraph, and referring to the customs of Anjou, Maine, and Lodunois, says:

It is the spirit of these customs which appears to have directed the compilers of the Code.

Photo pages 43, 44 and 45 exhibit the title page and pages 278 and 279, vol. 5, of the 4th edition of the work of Aubry and Rau (Paris, 1872).

The following is a translation of the sentence which precedes the reference to the foot-note 4:

But, in the relations of the spouses among themselves, the above cited maxim does not have a meaning so absolute; and, in reality, the wife was none the less, even during the marriage, coproprietor of the properties of the community.

## Translation of said foot-note 4:

It is only by regarding independently the relations of the married couple towards third parties, and their reciprocal relations, that it is possible to determine the true sense of the maxim: "The husband is the lord and master of the community," and to describe the position of the husband and that of the wife during the marriage. The distinction indispensable to make in this regard, has however escaped Toullier, and Messrs. Championniére and Rigaud, who, using as a foundation the remarks of Dumoulin and Pothier, cited in the preceding note, and to which they attribute an absolute meaning, assert that the wife is not, during the community, coproprietor of the common fortune, and that she has only a simple expectancy of coproprietorship, an expectancy which is realized or which vanishes, according to whether she accepts or renounces the community. The mistake they have made is the more astonishing as, in saying that during the marriage the husband is solus actu dominus. Dumoulin was careful to add, propter auctoritatem administrationis et alienandi potestatem; which, in describing and limiting his proposition, indicates sharply that he had in view only the exercise, as to the common properties, of the faculties or actions inherent in the right of property, and that he had not the least intention in the world of deciding, between the husband and the wife, the question of the ownership of their properties. The opinion which Toullier and Messrs. Championniére and Rigaud ascribe to Dumoulin and to Pothier, would moreover be in complete opposition to the opinion of all the other commentators on the customs.

"If the husband," says Lauriere (Custom of Paris, commentary on title X, art. 225), "is lord of the personalty and of the realty acquisitions, he is not the proprietor, at least only of one half, and if he can sell, alienate, hypothecate, it is only because he has the free administration, in his capacity as chief of the community."

See, also, Ferriere, Compilation of all the commentaries on the Custom of Paris, art. 225, gloss 1st, No. 1.

However that may be, the theory which we oppose appears absolutely incompatible with the letter and the meaning of the Civil Code, which has singularly restrained the power of the husband, as to the power to dispose gratuitously of the common properties. That theory is repulsed by the words:

the community commences on the day of the marriage;

the community is composed actively and passively, etc.;

and above all by the terms of art. 1492:

the wife who renounces loses every species of right in the goods of the community.

Fundamentally, one does not comprehend, if the wife is not, during the marriage, actual coproprietor of the common property, how the engagements contracted by her, with the simple authorization of the husband, could bind the community, even when she renounces it.

## Compare:

Article 1419.

Battur, I, 64.

Duranton, XIV, 96.

Rodiere and Pont, I, 326 and following.

Odier, I, 206 to 208.

Marcade, on the article 1399, number 5.

Troplong, II, 854, and following.

Zachary, §505, first note.

Photo pages Nos. 46, 47 and 48 exhibit the title page and pages 224 and 225 of volume 21, *Principes de Droit Civil*, by F. Laurent (Paris and Brussels, 1876). The incomplete sentence at the top of page 224 commences with the words: Le plus profond de nos anciens \* \* \*

## Translation:

The most profound of our ancient jurists expresses this thought in his clear style. "No, the wife is not associated," says Dumoulin, "she hopes to be." Pothier says almost the same thing, although in terms more measured: "While the community lasts, the husband is reputed in some fashion as the only lord and master absolute of the properties of which it is composed. The right which the wife has is regarded merely as an informal right, which is reduced to share the properties which compose the community on the day of the dissolution."

Toullier has taken these words literally, and he has concluded therefrom that the community does not commence to exist until it is dissolved, that is, if the wife accepts, for if she renounces, there is not, and never was, any community.

We believe it unnecessary to refute this error, or this paradox. Toullier himself has refuted it, for he admits that the texts are contrary to his opinion; inaccurate wording, he says, which should be corrected; but we say, as the commentator of Toullier remarks, that a multitude of texts say the contrary in regard thereto. This is not serious, and we will not discuss these pleasantries. It goes without saying that Toullier has remained alone in his opinion. All the authors oppose it, and

it is hardly worth the trouble. One author alone, and one of our best jurists, Championniere, has supported the paradox of Toullier; but as he does not produce any new arguments in support of an untenable cause, we consider it unnecessary to recommence a debate which was set at rest a long time ago.

We will be content to restate the facts which paradoxes always distort more or less. Is it true that, in the opinion of Dumoulin and of Pothier, there is no community? The wife is excluded from the management of the common interests, but these interests do not cease to be common. And Dumoulin has not said there is no community, he only said that the wife has not the rights of a veritable associate, and Pothier only repeated, with the customs, that the husband is lord and master, being careful to say that he is so in some fashion. Why these restrictions? Because the wife is really coproprietor. The ancient authors said so in all their writings. Listen to Lauriere:

"If the husband is lord of the personalty and the realty acquisitions, he is proprietor only of a half; and if he can sell, alienate, hypothecate, it is only because he has the free administration, in his capacity as chief of the community."

Such are the true principles of the ancient law: the two spouses are associates, but unequal associates, etc.

Photo pages Nos. 49, 50 and 51 exhibit the title page and pages 256 and 257 of volume 1 of Du Con-

trat de Mariage, by Baudry (3rd ed. Paris, 1906). Translation of paragraph 247:

The quasi-omnipotence of the husband over the common properties has created a controversy, the importance of which should not be exaggerated.

It is a doctrine according to which the wife would not have any actual right over the properties of the community. Such properties, during the community, would have only one sole proprietor: the husband. It is the rigorous application of the ancient formula: The husband is head and master of the community. This maxim is found even in the text of customs, notably in article 225 of the custom of Paris. Its literal interpretation can invoke the considerable authority of Dumoulin, who in his notes on the ancient custom of Paris, said in effect:

"During the marriage, the husband is by full right lord of all of the properties."

He added that the wife had only a potential right, which became a reality only at the dissolution of the community. "The wife is not a partner," he said, "but she hopes to be." This theory adopted by Pontanus and which appeared equally welcome to Pothier, was already opposed by Ferriere. Moreover, we believe that, even in the ancient law, the formulas above mentioned were only an energetic way of saying that, during the community, the right of the wife was, to some extent,

annihilated by the almost unlimited powers of the husband, without going as far as the negation of this right.

When Dumoulin described the right of the husband and the wife in the terms which we have mentioned, he simply wanted to say that the personal creditors of the wife, differently from those of the husband, could not enforce payment from the common properties.

Lauriere, in his commentary on the article 225 of the custom of Paris, had already remarked that the husband, head and master of the community, is not meanwhile proprietor, that he is only an administrator with extensive powers, including that of alienation. The ancient rule aimed at the considerable powers of the husband, but not at the proprietorship of the properties. The husband, subject to the possible renunciation of the community by the wife, is proprietor only of the moiety of the community property.

It is then hardly surprising that the theory, denying all right during the existence of the community, has only rallied two supporters in the 19th century, etc.

Note. Charles Dumoulin (1500-1566), whose name is written Molinœus in Latin, published a number of works, including Commentatiorum in consuctudines Parisienses pars Ia (1539).

#### APPENDIX X.

(T. D. 2450.)

## Estate tax.

Method of determining share in community property or property owned jointly or in entirety. To be returned as a portion of the gross estate of a decedent tenant.

TREASURY DEPARTMENT,

Office of Commissioner of Internal Revenue, Washington, D. C., February 14, 1917.

SIR: Receipt is acknowledged of your letter of the 6th instant, calling attention to the report of the revenue agent, dated the 3d instant, with regard to the liability to estate tax of the estate of ———.

You state that, under the Texas law, all property earned by a husband or wife during the period of their marriage is community property and owned jointly. The death of either does not affect the interest owned by the survivor; that is, this interest does not pass by inheritance. The public records in such cases may, however, be misleading because any conveyance, legally made to both, is apt to be recorded in the name of one, usually the husband. As a matter of fact, however, there is a legal presumption that the whole property conveyed to either is community, without reference to the manner of its acquisition. However, if property were purchased by the separate means or property of either,

or were received by either as an inheritance, such property would not be community but would be individual property, without reference to the manner in which the deed of conveyance is stated. Notwithstanding this, however, under the presumption of the Texas law, it would have to be considered community property until facts otherwise were developed.

In the case of the ——— estate the revenue agent reported as belonging to the estate of the deceased husband the entire property, which the public records showed as in his name. The widow, who is also administratrix, stated to the agent that the entire property so treated by the agent as the gross estate of the deceased husband was, in fact, community property, but up to this time she has submitted no evidence substantiating this contention. While for the purposes of local administration a presumption would be created by the local law in favor of the widow's contention in this case, such a presumption does not rest in her favor so far as any responsibility or duty that may be imposed upon her by Federal law is concerned. No State statute of this character has any modifying effect whatever upon the explicit terms of a Federal taxing act. The act of Congress of September 8, 1916, creates its own presumptions and defines explicitly the terms under which exemption from tax may be claimed.

You will note that, under section 202, paragraph C, there is required to be included in the gross

estate of a decedent all the interest held jointly or as tenants in the entirety by the decedent and another person, "except such part thereof as may be shown to have *originally* belonged to such other person and never to have belonged to the decedent." Under this paragraph of the taxing act, wherever the public records show property in the name of the decedent, the presumption is that it was the sole property of the decedent, and the burden of proving that another person owned, prior to the decedent's death, any interest therein is not upon the Government but is upon the estate.

You will note the extremely limiting terms of the paragraph quoted above, and that it must be shown that any part of the property to be excluded from the gross estate must have actually belonged in the first instance to a person other than the decedent and that it has never been owned by the decedent. If, under the Texas law, property conveyed to a husband or wife during their marriage is taken by each in entirety and in such a manner that it could not be contended that any specific part belonged to either, but that each was the owner of all, and upon the death of either no new interest or title vested in the survivor, as is the case in some States, the Government, under a strict and technical interpretation of paragraph C of section 202, would perhaps be justified in demanding that the whole of the property thus owned be included as a portion of the gross estate of the decedent. This, however, does

not seem to have been the intent of Congress, and it has heretofore been ruled in a similar case that one-half of the property thus jointly owned should be returned as a portion of the gross estate of the decedent husband or wife, as the case might be.

Respectfully,

W. H. OSBORN,

Commissioner of Internal Revenue.

Approved:

W. G. McADOO,

Secretary of the Treasury.

## (T. D. 3071.)

INCOME TAX—OPINION OF ATTORNEY GENERAL.

HUSBAND AND WIFE—COMMUNITY PROPERTY.

- 1. The earnings of husband and wife domiciled in Texas are community income, and such husband and wife, in rendering separate income tax returns, may each report as gross income one-half the total earnings of the husband and wife.
- 2. The income from separate property, except the increase, rents, and revenue from lands, is community income, and therefore husband and wife domiciled in Texas, in rendering separate income tax returns, may each report as gross income one-half the total income from separate property, except the increase, rents, and revenues from land held separately.
- 3. The income from community property as defined in article 4622, Vernon's Sayles's Statutes, is community income, and therefore husband and wife domiciled in Texas, in rendering separate income tax returns, may each report as gross income one-half the total income from such community property.

TREASURY DEPARTMENT,

() FFICE OF COMMISSIONER OF INTERNAL REVENUE,

Washington, D. C.

To collectors of internal revenue and others concerned:

There is given below in full for your information and guidance an opinion rendered by the Attorney General under date of August 24, 1920, dealing with the right of husband and wife domiciled in certain States having so-called "community property" laws to divide certain of their income for the purpose of the income tax.

WM. M. WILLIAMS, Commissioner of Internal Revenue.

Approved September 18, 1920: D. F. Houston, Secretary of the Treasury.

DEPARTMENT OF JUSTICE.

Washington, August 24, 1920.

DEAR MR. SECRETARY: Further acknowledging receipt of your favor of August 12, requesting my opinion on the three questions of law set forth below, to wit:

- 1. Are the earnings of husband and wife domiciled in Texas community income, and may they therefore in rendering separate income tax returns each report as gross income one-half of the total earnings of the husband and wife?
- 2. Is the income from separate property, as defined in article 4621, Vernon's Sayles's Statutes, 1918 edition, community income, and may

therefore husband and wife domiciled in Texas, in rendering separate income-tax returns, each report as gross income one-half of the total income from all separate property owned by them?

3. Is the income from community property, as defined in article 4622, Vernon's Sayles's Statutes, 1914 edition, community income, and may therefore husband and wife domiciled in Texas, in rendering separate income tax returns, each report as gross income one-half of the total income from community property?—

I have the honor to advise you as follows:

The revenue act of 1918 levies a tax on the net income of every individual (secs. 210 and 211). Net income is defined as gross income less deductions allowed (sec. 212). Gross income is defined as follows (sec. 213):

That for the purposes of this title (except as otherwise provided in sec. 233) the term "gross income"—

(a) Includes gains, profits, and income derived from salaries, wages, compensation for personal service (including in the case of the President of the United States, the judges of the Supreme and inferior courts of the United States, and all other officers and employees, whether elected or appointed, of the United States, Alaska, Hawaii, or any political subdivision thereof, or the District of Columbia, the compensation received as such), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, going out of the ownership or use of interest in such property; also

from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits, and income derived from any source whatever. The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under subdivision (b) of section 212, any such amounts are to be properly accounted for as of a different period.

The State constitution of Texas provides:

ART. VII, sec. 19, constitution 1845: All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterwards by gift, devise, or descent, shall be her separate property; and laws shall be passed more clearly defining the rights of the wife in relation as well as to her separate property as that held with her husband. Laws shall also be passed providing for the registration of the wife's separate property.

The statutes of the State of Texas determining property rights of husband and wife are as follows (art. 4622, Vernon's Sayles's Statutes, 1914 edition):

All property acquired by either the husband or wife during marriage, except that which is the separate property of either one or the other, shall be deemed the common property of the husband and wife, and during coverture may be disposed of by the husband only, provided, however, the personal earnings of the wife, the rents from the wife's real estate, the interest on bonds and notes belonging to her, and dividends on stocks owned by her shall be under the control, management, and disposition of the wife alone,

subject to the provisions of article 4621, as hereinabove written; and further provided that any funds on deposit in any bank or banking institution, whether in the name of the husband or the wife, shall be presumed to be the separate property of the party in whose name they stand, regardless of who made the deposit, and unless said bank or banking institution is notified to the contrary, it shall be governed accordingly in honoring checks and orders against such account.

Article 4621, Vernon's Sayles's Statutes, 1918 edition:

All property, both real and personal, of the husband owned or claimed by him before marriage, and that acquired afterwards by gift, devise, or descent, as also the increase of all lands thus acquired, and the rents and revenues derived therefrom, shall be his separate property. The separate property of the husband shall not be subject to the debts contracted by the wife, either before or after marriage, except for necessaries furnished herself and children after her marriage with him. All property of the wife, both real and personal, owned or claimed by her before marriage, and that acquired afterwards by gift, devise, or descent, as also the increase of all lands thus acquired, and the rents and revenues derived therefrom, shall be the separate property of the wife. During marriage the husband shall have the sole management, control, and disposition of his separate property, both real and personal, and the wife shall have the sole management, control, and disposition of her separate property, both real and personal; provided, however, the joinder of the husband in the manner now provided by law for conveyance of the separate real estate of the wife shall be necessary to an encumbrance or conveyance by the wife of her lands, and the joint signature of the husband and wife shall be necessary to a transfer of stocks and bonds belonging to her, or of which she may be given control by this act; provided also, that if the husband shall have permanently abandoned his wife, be insane, or shall refuse to join in such encumbrance, conveyance, or transfer of such property, the wife may apply to the district court of the county of her residence, and it shall be the duty of the court, in term time or vacation, upon satisfactory proof that such encumbrance, conveyance, or transfer would be advantageous to the interest of the wife, to make an order granting permission to make such encumbrance, conveyance, or transfer without the joinder of her husband, in which event she may encumber, convey, or transfer said property without such joinder. Neither the separate property of the wife, nor the rents from the wife's separate real estate, nor the interest on bonds and notes belonging to her, nor dividends on stock owned by her, nor her personal earnings, shall be subject to the payment of debts The homestead, contracted by the husband. whether the separate property of the husband or wife, or the community property of both, shall not be disposed of except by the joint conveyance of both the husband and the wife, except where the husband has permanently abandoned the wife, or is insane, in which instance the wife may sell and make title to any such homestead, if her separate property, in the manner herein provided for conveying or making title to her other separate estate.

The community property of the husband and wife shall not be liable for debts or damages resulting from contracts of the wife, except for

necessaries furnished herself and children, unless the husband joins in the execution of the contract. Provided that her rights with reference to the community property on permanent abandonment by the husband shall not be affected by the preceding sentence.

# Article 2469, Vernon's Sayles's Statutes:

Upon the dissolution of the marriage relation by death all property belonging to the community estate of the husband and wife shall go to the survivor, if there be no child or children of the deceased or their descendants; but if there be a child or children of the deceased, or descendant of such child or children, then the survivor shall be entitled to one-half of said property, and the other half shall pass to such child or children, or their descendants. But such descendants shall inherit only such portion of said property as the parent through whom they inherit would be entitled to if alive.

The community property system prevails in Texas, Arizona, California, Washington, Louisiana and New Mexico. It seems to have had its origin in France and Spain and to have been brought thence into our judicial system.

Community property laws provide generally that all property acquired during marriage, by the industry and labor of either husband or wife or both, together with the produce and increase thereof, belongs to both in equal shares, during the continuance of the marital relation. It has its foundation in the fact or the legal presumption that all property acquired during marriage, otherwise than by

gift, devise, or descent, is acquired by the joint efforts of husband and wife (Nickerson v. Nickerson, 65 Tex. 281, 284). Their relation partakes of the nature of a partnership, in which each partner may have separate estates or property, as well as common stock of acquisitions and gains. The business of the firm generally is transacted in the name of the husband, and he prosecutes and defends its suits with the same effect as if his partner were named in the case (Simpson v. Brotherton, 62 Tex. 170), and although community property has not all the incidents of partnership property it has many of them, and is commonly spoken of as partnership property (De Blanc v. Lynch & Co., 23 Tex. 25; Wilkinson v. Wilkinson, 20 Tex. 237). the conventional partnerships the gains of the partners are in proportion to their respective shares of stock and services, but in the conjugal partnerships the division is equal, though one may have brought in the greater part, if not all of the property from which the profits are derived, or may have contributed all his skill and services unaided by the other (Wheat v. Owens, 15 Tex. 241; Routh v. Routh, 57 Tex. 589, 595). The fact that one or the other of the spouses may do all the work does not change the character of community property (Yates v. Houston, 3 Tex. 452, 454), and though the management and disposal of community property during marriage are usually given to the husband this is said to be for reasons of public policy and

social economy and not on the grounds that the husband has any greater interest in it than the wife. Section 4622, Vernon's Sayles's Statutes, as amended in 1913, and as set forth above, provides that the personal earnings of the wife, the rents from her estate, the interest on bonds and notes belonging to her, and dividends owned on stocks owned by her shall be under the control, management, and disposition of the wife alone; but the supreme court of Texas held in Tannehill v. Tannehill (171 S. W. 1050), that such amendment did not change the character of rents from the wife's separate property, so as to make them her separate property, but that they continued to belong to the community estate and the husband was owner of one-half of same. (This before the amendment of sec. 4621 in 1917 made the rents from separate lands the separate property of the owner of the land.)

In Tucker v. Carr, (39 Tex. 98, 102) the court said "It is well settled that all property acquired during the marriage, whether by the labor of the husband or the wife, or the joint labor of both, whether the title be made to the husband or to the wife or to both jointly, is community property." Also see Cooke v. Bremond, (27 Tex. 457).

In Holyoke v. Jackson, (3 Pac. 841) the supreme court of Washington, in defining community property rights in that State held that the community "is like a partnership, in that some property com-

ing from or through one or other or both of the individuals, forms for both a common stock which bears the losses and receives the profits of its management and which is liable for individual debts; but it is unlike in that there is no regard paid to proportionate contribution, service, or business fidelity; that each individual once in it is incapable of disposing of his or her interest, and that both are powerless to escape from the relationship, to vary its terms, or to distribute its assets or its profits \* \* \*. In it the proprietary interest of husband and wife are equal, and those interests do not seem to be united merely, but unified."

There are numerous decisions holding that the proportional interests of husband and wife in community property are equal regardless of their individual contributions.

In Merrill v. Moore, (104 S. W. 514) the court said: "This community of interest is not made to depend upon the acquisition of the property during the time the parties actually live together, nor upon the fact that there was an equal amount of labor or capital contributed by the husband and wife in its accumulation. It is the property acquired during the marriage (with exceptions stated) that "shall be deemed the common property of husband and wife, and the right to an equality of enjoyment and division thereof, regardless of whether the one or the other has contributed little or nothing to its

acquisition' is well recognized." Also see Edwards v. Brown, (68 Tex. 329); Saunders v. Isbell, (24 S. W. 307); Barr v. Simpson, (117 S. W. 1041); Wright v. Hays' admr., (10 Tex. 130); Zimpleman v. Robb, (53 Tex. 274). That one-half of the common estate belongs to each spouse is recognized in T. D. 2450, which determines the method of assessing estate tax upon the estate of a decedent spouse.

The decisions in the various States seem to be unanimous on the proposition that the earnings of both husband and wife during the marriage belong to the community.

In Fennell v. Drinkhouse, (131 Calif. 477) it was held that money earned by the wife while living with her husband was community property, the court saying: "The possession of community property by the wife is the possession of the husband," and in Martin v. Southern Pacific Co., (130 Calif. 285), holding that moneys received as damages for injury to the wife are community property, it was said:

The services of the wife are a part of the earning power of the community, and the earnings received for her services constitute community property as much as do the earnings received for the services of the husband. If the injury had been received by the husband, it would not be contended that he could not recover for the damage sustained by the loss of his earning capacity. In either case the earnings would be community property, and any act by which either husband or wife is de-

prived of the capacity to render services diminishes the capacity to accumulate community property. If the services voluntarily rendered by the wife obviate the necessity of employing other assistance the amount of the community property is thereby enhanced in the amount that would be required for such assistance. \* \* \*

See also Washburn v. Washburn, (9 Calif. 475).

Under the Louisiana statutes the profits of the industry of both spouses and the fruits of their separate estates fall into the community. Succession of Webre, (49 La. 1491, 22 So. 390); Knight v. Kaufman, (105 La. 35, 29 So. 711); Manning v. Burke, (107 La. 456, 31 So. 862). The decisions of the supreme court of the State of Washington are to the same effect. Abbott v. Weatherby, (6 Wash. 507, 33 Pac. 1070); Yake v. Pukh, (13 Wash. 78, 42 Pac. 528); Sherlock v. Denny, (28 Wash. 170, 68 Pac. 452). There are numerous decisions by the supreme court of Texas holding that in Texas the earnings of the husband and wife are community property. Cline v. Hackbarth. (27 Tex. Civ. App. 391, 65 S. W. 1086); Johnson v. Burford, (39 Tex. 242); Pearce v. Jackson, (61 Tex. 642); Cooke v. Bremond, (27 Tex. 457). In the latter case the court said:

Our whole system of marital rights is based upon the fact that acquisitions either of the joint or separate labor or industry of the husband or wife become common property; and as a general rule, deducible from this principle, all property acquired by purchase or apparent onerous title, whether the conveyance be in the name of the husband or of the wife, or in the names of both is prima facie presumed to belong to the community.

Under the laws of the various States wherein the community property system obtains, the earnings of separate property of the spouses with such exceptions as are specifically provided for by statute, are community property. See Barr v. Simpson, (117 S. W. 1040, Tex.), and Hayden v. McMillan, (23 S. W. 430, Tex.).

The latter case was decided when article 2851. revised statutes of Texas, provided that all the property owned by the wife before marriage or acquired afterwards by gift, devise, or descent, and the "increase of all lands thus acquired" should be the separate property of the wife. And the court held that rents accruing on the separate lands of the wife were community property and subject to garnishment for community debts. This case also establishes the proposition that such community interest attaches the moment the property comes into existence, the court saying: "The moment the rents become due they are disconnected from the land and become personal property, and, being acquired by the joint labors of the married couple put forth during the marital relation, they must necessarily be community."

From the above authorities I am convinced that under the law of Texas the earnings of the husband

and wife belong to them jointly in equal shares; that the community interest attaches as soon as the right to the wages comes into existence, and that the increase and revenues from the separate property of each spouse except the increase, rents and revenues from lands, is also community property in which the interests of husband and wife are equal.

These propositions being established it follows that the earnings of husband and wife and the revenues from their separate personal property are community "income," under the provisions of the act of February 24, 1919. Gross income under the terms of the act includes "gains, profits, and income derived from salaries, wages, compensation for personal services of whatever kind and in whatever form paid, or from professions, vocations, trades, business, commerce, or sales, or dealings in property whether real or personal, growing out of the ownership or use of or interest in such property."

The law of Texas presumes that the earnings of the husband and wife are the product of their joint labor and rests the ownership of same in the community; they are therefore community "income," to wit, "gains, profits and income" of the community, "derived from salaries, wages, compensation for personal services," \* \* \* professions, vocations, as the case may be.

Under the statutes of Texas heretofore set forth, the separate property of the spouses is defined as that "owned or claimed by him (or her) before marriage, and that acquired afterwards by gift, devise or descent," and also "the increase of all lands thus acquired, and the rents and revenues derived therefrom." It is to be noted that the increase of separate personal property and the revenues derived therefrom are not the separate property of the owner of the personalty, but are community property. Carr v. Tucker, (42 Tex. 330); Epperson v. Jones, (65 Tex. 425; Barr v. Simpson, (117 S. W. 1041). They are therefore "income" to the community, to wit, "gains, profits and income \* \* \* from businesses, commerce, or sales or dealings in property \* \* \* growing out of the ownership or use of or interest in such property."

Since one-half of all community property vests in each spouse, it follows that one-half of the increase and revenues from separate property of the spouses, except increase and rents and revenues from lands, is income to each of said spouses.

Community property under the laws of Texas belongs jointly to husband and wife; it follows that the income therefrom accrues to husband and wife in equal shares. I therefore conclude:

- 1. That the earnings of husband and wife domiciled in Texas are community income, and such husband and wife in rendering separate income-tax returns may each report as gross income one-half the total earnings of the husband and wife.
- 2. That the income from separate property, except the increase, rents, and revenues from lands, is com-

munity income, and that therefore husband and wife domiciled in Texas in rendering separate income-tax returns may each report as gross income one-half the total income from separate property, except the increase, rents, and revenues from land held separately.

3. That the income from community property as defined in article 4622, Vernon's Sayles's Statutes, quoted above, is community income, and that therefore husband and wife domiciled in Texas in rendering separate income-tax returns may each report as gross income one-half the total income from such community property.

Respectfully,

A. MITCHELL PALMER, Attorney General.

Hon. David F. Houston, Secretary of the Treasury.

## (T. D. 3138.)

INCOME AND ESTATE TAXES—HUSBAND AND WIFE— COMMUNITY PROPERTY—OPINION OF ATTORNEY GENERAL,

- 1. In Washington, Arizona, Idaho, New Mexico, Louisiana and Nevada the husband and wife domiciled therein, in rendering separate income tax returns, may each report as gross income, one-half of the income which under the laws of the respective States becomes, simultaneously with its receipt, community property; this is not based upon any statute enacted subsequent to March 1, 1913, and applies under income tax acts prior to the revenue act of 1918.
- 2. In Washington, Arizona, Idaho, New Mexico, Louisiana and Nevada there should be included in gross estate, in computing the estate tax of a deceased spouse, one-half only of the community property of the husband and wife domiciled therein; this is not based upon any statute enacted subsequent to March 1, 1913, and applies under estate tax acts prior to the revenue act of 1918.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

To Collectors of internal revenue and others concerned:

There is given below in full for your information and guidance an opinion rendered by the Attorney General under date of February 26, 1921, dealing with the right of husband and wife domiciled in certain States having so-called "community property" laws to divide certain of their income for the purpose of the income tax, and as to the inclusion of community property in the gross estate of a deceased spouse. See in this connection, T. D. 3071.

WM. M. WILLIAMS,

Commissioner of Internal Revenue.

Approved March 3, 1921:

D. F. HOUSTON,

Secretary of the Treasury.

DEAR MR. SECRETARY: My opinion has been requested upon the following questions:

1. In which of the States, other than Texas, in which the community property system exists may a husband and wife domiciled therein, in rendering separate income tax returns, each report as gross income one-half of the income which under the laws of such state becomes, simultaneously with its receipt, community property?

2. In which of the States in which the community property system exists should there be included in gross estate, in computing the estate tax of the estate of a deceased spouse, one-half and only one-half of the community property of husband and wife domiciled therein?

3. If your answers to questions 1 and 2, as to any State are based upon a statute enacted subsequent to March 1, 1913, please give the rule as to such state existing from March 1, 1913, to the passage of such statute, for my guidance in allowing claims for refund.

4. Do your answers to questions 1 and 2 apply under income and estate tax acts prior to the revenue act of 1918?

The community property system prevails in Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington. The application of the income tax act to the income from community property belonging to husband and wife domiciled in Texas was disposed of in my opinion of September 10, 1920.

The significant portions of the Arizona statutes bearing upon the community property system in that State, all of which except article 1100 were enacted prior to 1913, are:

ART. 3850. All property acquired by either husband or wife during the marriage, except that which is acquired by gift, devise or descent, or earned by the wife and her minor children, while she has lived or may live, separate and apart from her husband, shall be deemed the common property of the husband and wife, and during the coverture personal property may be disposed of by the husband only; but husband and wife must join in all deeds and mortgages affecting real estate except unpatented mining claims, which may be conveyed by the husband or wife only, as provided by the laws of this State relating to conveyances; provided that either husband or wife may convey or mortgage separate property without the other joining in such conveyance or mortgage.

ART. 1100. Upon the death of the husband one-half of the community property shall go to the surviving wife, and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition goes to his

descendants, equally, if such descendants are of the same degree of kindred to the decedent, otherwise according to the right of representation; and in the absence of both such distribution and such descendants, is subject to distribution in the same manner as the separate property of the husband. Upon the death of the wife one-half of the community property shall go to the surviving husband, and the other half is subject to the testamentary disposition of the wife, and in the absence of such disposition goes to the descendants, equally, if such descendants are of the same degree of kindred to the decedent, otherwise according to the right representation, and in the absence of both such distribution and such descendants, is subject to distribution in the same manner as the separate property of the husband.

ART. 2061. No conveyance, transfer, mortgage or incumbrance of any real estate which is the common property of husband and wife, or any interest therein, shall be valid unless such conveyance, transfer, mortgage or incumbrance shall be executed and acknowledged by both the husband and wife. But the provisions of this section shall not apply to unpatented mining claims, which may be conveyed, transferred, mortgaged or incumbered by the one in whose name the title or right of possession of any such mining claim may be, without the other joining in such conveyance, transfer, mortgage or incumbrance.

ART. 3848. All property, both real and personal, of the husband, owned or claimed by him before marriage and that acquired afterward, by gift, devise or descent, as also the increase, rents, issues and profits of the same, shall be his separate property, and all property, both real and personal of the wife, owned or claimed by her before marriage, and that acquired afterward by gift, devise, or descent,

as also the increase, rents, issues, and profits of the same, shall be her separate property.

Prior to 1913 article 1100 read:

Upon the dissolution of the marriage relation by death all the common property belonging to the community estate of the husband and wife shall go to the survivor if the deceased have no child or children; but if the deceased have a child or children, his survivor shall be entitled to one-half of said property and the other half shall pass to the child or children.

The Supreme Court of the State of Arizona has held these statutes establish in the wife an equal interest with the husband in community property in that State. In the case of *La Tourette* v. *La Tourette* (15 Ariz., 200) [1914], the court said, after reviewing the statutes above set forth:

The law makes no distinction between the husband and wife in respect to the right each has in the community property. It gives the husband no higher or better title than it gives the wife. It recognizes a marital community wherein both are equal. Its policy plainly expressed is to give the wife in this marital community an equal dignity, and make her an equal factor in matrimonial gains.

That the interest of the wife in the community property during the coverture is not a mere possibility—not the expectancy of an heir—is quite apparent. The old saying is not true that community is a partnership which begins only at its end. Upon the dissolution of the community by death, the wife does not inherit her share of the common property, but with

the death of the husband the management and control of the statutory agent or trustee ceases. The wife acquires not her share, for that was already hers, but in addition to her share, she acquires the right of management, control, and disposition of that share, her status being thereby fixed as that of a feme sole. If there be no child or children of the deceased husband, all of the common property goes to the surviving wife. She has her share in the property, and in addition by right of survivorship and not as an heir, she acquires the share that belonged to the husband, and she takes all of the property in her own right, and with respect to the management, control, and disposition of such property is reduced to the status of a feme sole and must henceforward with respect to it act for herself.

The Idaho law provides, article 4056 of the Compiled Statutes of 1919, that all property of the wife owned by her before marriage, and that acquired afterwards, by gift, bequest, devise, or descent, or that which she shall acquire with the proceeds of her separate property, shall remain her sole and separate property to the extent and with the same effect as the property of her husband similarly acquired.

Article 4659 defines the separate property of the husband to be all property owned by him before marriage, and that acquired by gift, bequest, devise or descent. Community property is defined as—

all other property acquired after marriage by either husband or wife, including the rents and profits of the separate property of the husband and wife \* \* \* unless by the instrument by which any such property is acquired by the wife

it is provided that the rents and profits thereof be applied to her sole and separate use; in which case the management and disposal of such rents and profits belong to the wife, and they are not liable for the debts of the husband.

## By article 4666-

the husband has the management and control of the community property except the earnings of the wife for the personal services and the rents and profits of her separate estate. But he can not sell, convey, or encumber the community real estate unless the wife join with him in executing and acknowledging the deed or other instrument of conveyance by which the real estate is sold, conveyed, or encumbered.

This section, which was amended in 1915 to read as above, previously and by amendment in 1913, provided:

The husband has the management and control of the community property, but he shall not sell, convey, or encumber community real estate unless the wife join with him in executing the deed or other instrument of conveyance by which the real estate is sold, conveyed, or encumbered, and such deed or other instrument of conveyance must be acknowledged by him and by his wife.

A new provision of the law of 1915, article 4667, reads:

The wife has the management and control of the earnings for her personal services, and the rents and profits of her separate estate.

On the death of either husband or wife it is provided by article 7803, that—

One-half of all the community property shall go to the survivor, subject to the community debts, and the other half shall be subject to the testamentary disposition of the deceased husband or wife in favor only of his, her, or their children or a parent of either spouse, subject also to the community debts, provided that not more than one-half of the decedents' half of the community property may be left by will to a parent or parents. In case no such testamentary disposition shall have been made by the deceased husband or wife of his or her half of the community property, it shall go to the survivor. subject to the community debts, the family allowance and the charges and expenses of administration: Provided, however, That no administration of the estate of the wife shall be necessary if she dies intestate.

Section 5713, as previously enacted in 1907, provided:

Upon the death of either husband or wife onehalf of the community property shall go to the survivor, subject to the community debts, and the other half shall be subject to the testamentary disposition of the deceased husband or wife, subject also to the community debts. case no testamentary disposition shall have been made by the deceased husband or wife of his or her share of the community property it shall descend equally to the legitimate issue of his, her, or their bodies. If there be no issue of said deceased living, or none of their representatives living, then the said community property shall all pass to the survivor, to the exclusion of collateral heirs, subject to the community debts, the family allowance, and the charges and expenses of administration.

In Ewald v. Hufton, 31 Idaho, 373 (173 Pac., 247), decided in 1918, the Supreme Court of Idaho said that under the laws of Idaho no distinction is made between husband and wife as to the degree, quantity, nature, or extent of the interest each has in community property, and held that upon the dissolution of the community by the death of either spouse the survivor becomes tenant in common with the heirs of the deceased member and the survivor can not convey title to the half belonging to the heirs which descended to them from the deceased spouse. It was therein decided that after the death of the wife a conveyance by the surviving husband conveys title only to his half.

In Kohny v. Dunbar, 21 Idaho, 258 (121 Pac., 544), decided in 1912, the Supreme Court of Idaho fully considered the respective interests of husband and wife. This was a case where it was attempted, after the death of the husband, to levy an inheritance tax under the Idaho inheritance tax law upon the wife's half of the community property. court held that section 5713, Revised Statutes of Idaho, as amended in 1907, in force at the time of the death of Kohny, recognized the husband and wife as equal partners in the community estate and authorized each to dispose of his or her half by will, and that the survivor on the death of one spouse merely continued to hold as owner one-half of the community property subject to the payment of community debts, saying:

This statute clearly and unmistakably provides that the surviving spouse takes his or her half of the community property not by succession, descent, or inheritance, but as survivor of the marital community or partnership. The same section provides further that in the event there be no issue of the marriage living at the time of the death of one of the spouses and he or she leaves no will or testament, the half of the community property which belonged to the deceased shall go to the survivor as an heir, and, therefore, by descent and under and by virtue of the intestate laws of the State.

Since the interests of both husband and wife are the same and equal in and to the community property, and each takes one-half interest therein by will, it is clear to us that if the wife must pay an inheritance tax on her half of the property upon the death of her husband, that the husband would likewise be obliged to pay an inheritance tax on his half of the property on the death of his wife. The law clearly places them both on an equality in this respect. This illustration, however, accentuates the unreasonableness of the contention, for no one claims that the husband is required to pay such tax on his interest in the community estate.

We conclude that upon the death of husband or wife, the survivor takes one-half of the property in his or her own right as survivor and is not liable under sec. 1873 (Inheritance Tax Act) to pay an inheritance tax on such interest in the community estate.

The significant portions of the laws of Louisiana bearing on the questions before us are found in the following articles of the Revised Civil Code: ART. 915. In all cases, when either husband or wife shall die, leaving no descendants nor ascendants, and without having disposed by last will and testament, of his or her share in the community property, such undisposed of share shall be inherited by the survivor in full ownership.

ART. 916. In all cases, when the predeceased husband or wife shall have left issue of the marriage with the survivor, and shall not have disposed by last will and testament, of his or her share in the community property, the survivor shall hold a usufruct, during his or her natural life, so much of the share of the deceased in such community property as may be inherited by such issue. This usufruct shall cease, however, whenever the survivor shall enter into a second marriage.

Article 915 was amended in 1920 to read as follows:

When either husband or wife shall die, leaving neither a father nor mother nor descendants. and without having disposed by last will and testament of his or her share of the community property, such undisposed of share shall be inherited by the surviving spouse in full ownership. In the event the deceased leave descendants his or her share in the community estate shall be inherited by such descendants in the manner provided by law. Should the deceased leave no descendants, but a father and mother (or either), then the share of the deceased in the community estate shall be divided in two equal portions, one of which shall go to the father and mother or the survivor of them, and the other portion shall go to the surviving spouse.

ART. 2332. The partnership, or community of acquests or gains, need not be stipulated; it exists

by operation of law, in all cases where there is no stipulation to the contrary.

But the parties may modify or limit it; they may even agree that it shall not exist.

ART. 2334. The property of married persons is divided into separate property and common property.

Separate property is that which either party brings into the marriage, or acquires during the marriage by inheritance or by donation made to him or her particularly.

Common property is that which is acquired by the husband and wife during marriage, in any manner different from that above declared.

ART. 2385. The paraphernal property, which is not administered by the wife separately and alone, is considered to be under the management of the husband.

ART. 2386. When the paraphernal property is administered by the husband, or by him and the wife indifferently, the fruits of this property, whether natural, civil, or the result of labor, belongs to the conjugal partnership, if there exists a community of gains. If there do not, each party enjoys, as he chooses, that which comes to his hands; but the fruits and revenues which are existing at the dissolution of the marriage, belong to the owner of the things which produce them.

ART. 2399. Every marriage contracted in this State, superinduces of right partnership or community of acquests or gains, if there be no stipulation to the contrary.

ART. 2402. The partnership or community consists of the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, of the produce of the reciprocal industry and labor of both husband and wife, and of the estates which they

may acquire during the marriage, either by donations made jointly to them both, or by purchase, or in any other similar way, even although the purchase be only in the name of the two and not of both, because in that case the period of time when the purchase is made is alone attended to, and not the person who made the purchase.

ART. 2404. The husband is the head and master of the partnership or community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title, without the consent and permission of his wife.

He can make no conveyance inter vivos, by a gratuitous title, of the immovables of the community, nor of the whole, or of a quota of the movables, unless it be for the establishment of the children of the marriage.

Nevertheless he may dispose of the movable effects by a gratuitous and particular title, to the benefit of all persons.

But if it should be proved that the husband has sold the common property, or otherwise disposed of the same by fraud, to injure his wife, she may have her action against the heirs of her husband, in support of her claim in one-half of the property, on her satisfactorily proving the fraud.

ART. 2406. The effects which compose the partnership or community of gains, are divided into two equal portions between the husband and the wife, or between their heirs, at the dissolution of the marriage; and it is the same with respect to the profits arising from the effects which both husband and wife brought reciprocally in marriage, and which have been administered by the husband, or by husband and wife conjointly, although what has been thus

brought in marriage, by either the husband or the wife, be more considerable than what has been brought by the other, or even although one of the two did not bring anything at all.

These statutes were all enacted prior to 1913 except article 915 which was amended in 1916 and again in 1920. The later amendments provide for the succession of the deceased spouse's half of the community property when such spouse dies without disposition of such interest by will.

Up to 1907, with a few exceptions, the courts of Louisiana appeared to have generally adhered to the view that the wife's interest in the community property is that of an expectant heir, and that she has no vested interest therein until the dissolution of the community. But in the Succession of Marsal, 118 La., 211 (1907), it was held that the wife did not take either her one-half of the community property nor the usufruct of her husband's one-half as heir (art. 916) and that she was not therefore compelled to pay an inheritance tax on either under the inheritance tax law of Louisiana, saying:

It is true that the right of usufruct which is vested in the surviving spouse is defeasible at the will of the deceased, but it is, nevertheless, a right conferred by the law, which enters into and forms a part of the marriage contract, and, of which the survivor can be deprived by no one save the deceased spouse, and it seems to us hardly correct to say that the surviving spouse necessarily takes the usufruct by inheritance from the deceased, because the latter has not made a testamentary disposition to the contrary.

In the Succession of May, 120 La., 691 (1908), it was held on the other hand that where a deceased wife had by will bequeathed her one-half interest in the community property to her husband, the husband must pay an inheritance tax on such share after community debts had been deducted from the whole.

The principle that the rights of husband and wife in the partnership's gains grow out of the marriage contract and do not originate at its dissolution was expounded by the court in *Dixon* v. *Dixon's Executors*, 4 La., 188 (1831), where it was said that the wife has rights in the acquests before the husband dies and that the objection confounds the power of the husband to defeat the wife's rights with the existence of such rights.

In Beck v. Natalie Oil Co., 143 La., 154 (1918), the court said:

The property involved in this suit was acquired by the father of plaintiffs while the community of acquests and gains existed between him and the mother of the plaintiffs, and the mother of the plaintiffs as partner in community, became owner of one-half of it. This half the plaintiffs inherited from their mother, subject to the payment of the debts of the community.

In New Mexico the following statutes enacted in 1907 or prior thereto define the respective rights of husband and wife in that State:

Sec. 2757. All property of the wife owned by her before marriage and that acquired afterthe rents, issues and profits thereof is her separate property. The wife may without the consent of her husband convey her separate property.

SEC. 2758. All property owned by the husband before marriage, and that acquired afterwards by gift, bequest, devise or descent, with the rents, issues, and profits thereof is his separate

property.

Sec. 2764. All other property acquired after marriage by either husband or wife, or both, is community property; but whenever any property is conveyed to a married woman by an instrument in writing the presumption is that title is thereby vested in her as her separate property. And if the conveyance be to such married woman and to her husband, or to her and any other person, the presumption is that the married woman takes the part conveyed to her, as tenant in common unless a different intention is expressed in the instrument, and the presumption in this section mentioned, is conclusive in favor of a purchaser or incumbrancer in good faith and for a valuable consideration. And in cases where married women have conveyed or shall hereafter convey, real property which they acquired prior to March 18, 1907, the husband, or their heirs or assigns, of such married women, may be barred from commencing or maintaining any action to show that said real property was community property, or to recover said real property, as follows: as to conveyances hereafter made from and after one year from the filing for record in the county clerk's office of such conveyances respectively.

SEC. 2766. The husband has the management and control of the community property, with the like absolute power of disposition, other than testamentary, as he has of his separate estate:

Provided, however, That he can not make a gift of such community property, or convey the same without a valuable consideration, unless the wife, in writing, consent thereto, and: Provided. also, That no sale, conveyance, or incumbrance of the homestead, which is then and there being occupied and used as a home by the husband and wife, or which has been declared to be such by a written instrument signed and acknowledged by the husband and wife and recorded in the county clerk's office of the county, and furniture, furnishings and fittings of the home, or of the clothing and wearing apparel of the wife or minor children, which is community property, shall be made without the written consent of the wife.

Sec. 2767. Whenever the husband is non compos mentis or has been convicted of a felony and sentenced to imprisonment for a period of more than one year or has abandoned his wife and family and left her and his family, if they have children, without support, or is an habitual drunkard, or for any other reason is incapacitated to manage and administer the community property the wife may present a petition duly verified to the district court of the county wherein any of the community property is located or situated, stating the name of her husband, a description of all community property, both real and personal, and the facts which render him incapacitated to manage and administer the community property and praying that she be substituted for her husband, as the head of said community, with the same power of managing, administering, and disposing of the community property, as is vested in the husband by this chapter.

SEC. 2770. Upon the hearing of the petition so filed by the wife the court shall render judg-

ment therein, either dismissing said petition or adjudging the wife thereafter to be the head of said community, with full power of managing, administering and disposing of the community property, either real or personal, with such limitation therein as to the court may appear to be in furtherance of justice.

SEC. 2774. Whenever husband and wife shall have permanently separated and no longer live or cohabit together as husband and wife, either may institute suit in the district court for a division of property, or for the disposition of the children, without waiting for or obtaining in said suit a dissolution of the bonds of matrimony; \* \* \*

SEC. 2781. The failure to divide the property on divorce shall not affect the property rights of either the husband or wife, either may subsequently institute and prosecute, a suit for division and distribution thereof, or with reference to any other matter pertaining thereto which could have been litigated in the original suit for divorce.

SEC. 1840. Upon the death of the wife, the entire community property, without administration, belongs to the surviving husband, except such portion thereof as may have been set apart to her by a judicial decree, for her support and maintenance, which portion is subject to her testamentary disposition, and in the absence of such disposition, goes to her descendants, or heirs, exclusive of her husband.

SEC. 1841. Upon the death of the husband one-half of the community property goes to the surviving wife and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition goes one-fourth to the surviving wife and the remainder in equal shares to the children of the decedent

and further as provided by law. In the case of the dissolution of the community by the death of the husband the entire community property is equally subject to his debts, the family allowance, and the charge and expenses of administration.

Section 2766 was amended in 1915 to read as follows:

The husband has the management and control of the personal property of the community, and during coverture the husband shall have the sole power of disposition of the personal property of the community, other than testamentary, as he has of his separate estate; but the husband and wife must join in all deeds and mortgages affecting real estate: Provided, That either husband or wife may convey or mortgage separate property without the other joining in such conveyance or mortgage: And provided further, That any transfer or conveyance attempted to be made of the real property of the community by either husband or wife alone shall be void and of no effect.

In the recent case of *Beals* v. *Ares* (185 Pac., 780) [1919], the Supreme Court of New Mexico carefully reviewed the history of the community property system in New Mexico, arriving at the following conclusions:

(1) That under the law in this jurisdiction the wife's interest in the community property is equal with that of the husband; that, while he is by statute made the agent of the community and given dominion and control over the community property during the continuance of the marriage relation, his interest in the property

by reason of such fact is not superior to that of his wife.

(2) That the wife does not forfeit her interest in the community property by the commission

of adultery.

(3) That there is no statute in this State conferring upon the district court the power to divide the community property between the parties at its discretion; that, while it has power to divide the property, this power does not extend further than to set apart to each of the spouses their undivided half interest in the property.

(4) That the district courts have the power in all cases to set apart such portion of the community property or of the property of the respective spouses as in its discretion may be necessary for the proper support, care, and maintenance of the children born as a result of the

marriage.

The conclusion of the court that the interest of husband and wife in community property are equal is based upon the provisions of sections 2774 and 2781; the former, the court says—

clearly recognizes an existing, present interest in the wife during the existence of the matrimonial status: \* \* \* Section 7481 recognizes that this interest continues even after divorce, where the property is not divided by the decree in the divorce case. Now, if she had no interest in the property during the existence of the community, but simply an expectancy which would ripen into an interest only upon the death of the husband, and which expectancy continued only during the existence of the marital status, this expectant interest would be cut off by the divorce decree \* \* \*

\* \* \* The sections referred to clearly recognize a present interest in the wife, and the whole act shows that she was an equal partner with her husband in the matrimonial gains. He was constituted by section 16, chapter 37, Laws 1907, as the agent or manager of the community property, but this did not vest him with the larger or superior interest in the property upon division.

In Nevada the relative rights of husband and wife in community property are defined in the following sections of the Revised Laws of that State:

SEC. 2155. All property of the wife owned by her before marriage, and that acquired by her afterwards by gift, bequest, devise or descent, with the rents, issues and profits thereof, is her separate property; and all property of the husband, owned by him before marriage, and that acquired by him afterwards by gift, bequest, devise or descent, with the rents, issues, and profits thereof, is his separate property.

SEC. 2156. All other property acquired after marriage, by either husband or wife, or both, except as provided by sections 14 and 15 of this

act is community property.

SEC. 2160. The husband shall have the entire management and control of the community property, with the like absolute power of disposition thereof, except as hereinafter provided, as of his own separate estate: Provided, That no deed of conveyance or mortgage of a homestead as now defined by law, regardless of whether a declaration thereof has been filed or not, shall be valid for any purpose whatever unless both the husband and wife execute and acknowledge the same as now provided by law for the conveyance of real estate: Provided,

further, That the wife shall have the entire management and control of the earnings and accumulations of herself and her minor children living with her, with the like absolute power of disposition thereof, when said earnings and accumulations are used for the care and maintenance of the family.

Sec. 2164. Upon the death of the wife the entire community property belongs, without administration, to the surviving husband, except that in case the husband shall have abandoned his wife and lived separate and apart from her without such cause as would have entitled him to a divorce, the half of the community property subject to the payment of its equal share of the debts chargeable to the estate owned in community by the husband and wife, is at her testamentary disposition in the same manner as her separate property and in the absence of such disposition goes to her descendants equally, if such descendants are in the same degree of kindred to the decedent; otherwise, according to the right of representation; and in the absence of both such disposition and such descendants, goes to her other heirs at law, exclusive of her husband.

SEC. 2165. Upon the death of the husband one-half of the community property goes to the surviving wife, and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition goes to his surviving children, equally, and in the absence of both such disposition and surviving children, the entire community property belongs without administration to the surviving wife except as hereinafter provided, subject, however, to all debts contracted by the husband during his life that were not barred by the statute of limitations at the time of his death: *Pro-*

vided, however, That the homestead set apart by the husband and wife, or either of them before his death, and such other property as may be exempt by law from execution or forced sale, shall be set apart for the use of the widow and minor heirs, and if no minor heirs, for the use of the widow. In case of the dissolution of the community by the death of the husband, the entire community property is equally subject to his debts, the family allowance and charges and expense of administration: Provided, however, That if in the absence of said testamentary disposition the surviving wife and children, and in the absence of such children the wife shall pay or cause to be paid all indebtedness legally due from said estate, or secure the payment of the same to the satisfaction of the creditors of said estate, then and in such case the said community property shall not be subject to administration.

Section 2166 provides that on dissolution of the marriage on divorce the community property must be equally divided between the parties, except that in case of divorce for adultery or extreme cruelty the guilty party is entitled to only so much thereof as the court may allow. All of the above sections, except 2160, which was amended in 1917, were enacted prior to 1913.

One of the most recent and comprehensive decisions of the Supreme Court of Nevada, interpreting the above statutes and defining the interests of husband and wife in community property, is in re Williams (40 Nev., 241), rendered in 1916. In that case it was sought to collect a tax under the Nevada

inheritance tax act of 1913 on the one-half of the community property which passed to the wife on the death of the husband. But the court, after a careful review of the decisions and the constitution of the State, which provided in section 31 of article 4 that "laws shall be passed more clearly defining the rights of the wife in relation as well to her separate property, as to that held in common with her husband," said:

It may, we think, be asserted, supported by the great weight of authority, that the interest of the wife in the community property and her title thereto is no less than that held by the husband, and this interest and title in the wife is not to be regarded as a mere expectancy.

Concluding, as we do, that the wife's interest in the community property goes to her, not by succession or inheritance, but rather by a right vested in her at all times during marriage, it follows that it is not subject to the law of inheritance tax.

The respective rights of the husband and wife in the community property of the State of Washington are defined by the following sections of Pierce's Washington Code of 1919, all of which were enacted prior to 1913:

Sec. 1424. The property and pecuniary rights of every married woman at the time of her marriage or afterwards acquired by gift, devise or inheritance, with the rents, issue, profits thereof, shall not be subject to the debts or contracts of her husband, and she may manage, lease, sell, convey, encumber, or devise by will such property to the same extent and in the same manner

that her husband can, property belonging to him.

SEC. 1428. A wife may receive the wages of her personal labor, and maintain an action therefor, in her own name and hold the same in her own right, and she may prosecute and defend all action at law for the preservation and protection of her rights and property as if unmarried.

SEC. 1432. Property and pecuniary rights owned by the husband before marriage and that acquired by him afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, shall not be subject to the debts or contracts of his wife, and he may manage, lease, sell, convey, encumber, or devise by will such property without the wife joining in such management, alienation, or encumbrance, as fully and to the same effect as though he were unmarried.

Sec. 1433. Property not acquired or owned, as prescribed in sections 2400 and 2403, acquired after marriage by either husband or wife, or both, is community property. The husband shall have the management and control of community personal property, with a like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof.

SEC. 1434. The husband has the management and control of the community real property, but he shall not sell, convey, or encumber, the community real estate, unless the wife join with him in executing the deed or other instrument of conveyance by which the real estate is sold, conveyed, or incumbered, and such deed or other instrument of conveyance must be acknowledged by him and his wife: Provided, however, That all such community real estate

shall be subject to the liens of mechanics and others for labor and materials furnished in erecting structures and improvements thereon as provided by law in other cases, and to liens of judgments recovered for community debts, and to sale on execution issued thereon.

SEC. 1435. Upon the death of either husband or wife, one-half of the community property shall go to the survivor subject to the community debts, and the other half shall be subject to his testamentary disposition of the deceased husband or wife, subject also to the community debts.

SEC. 1436. In case no testamentary disposition shall have been made by the deceased husband or wife of his or her half of the community property it shall descend equally to the legitimate issue of his, her, or their bodies. If there be no issue of said deceased living or none of their representatives living, then the said community property shall all pass to the survivor, to the exclusion of collateral heirs, subject to the community debts, the family allowance, and the charges and expenses of administration.

It appears to be the settled law of that State that the wife has, during coverture, as well as upon the dissolution of the marriage, a vested and definite interest and title in the community property, equal in all respects to the interest and title of her husband therein. Leading cases are: Holyoke v. Jackson, 3 Wash. T. 235; Mabie v. Whitaker, 39 Pac. 172; Marston v. Rue, Wash. 129, 159 Pac. 111; Schramm v. Steele, 166 Pac. 634, 97 Wash. 309; Huyvaerts v. Roedtz, 178 Pac. 801.

The statutes of California defining the relative property rights of husband and wife are found in the following sections of the civil code:

SEC. 162. All property of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is her separate property. The wife may, without the consent of her husband, convey her separate property.

SEC. 163. All property owned by the husband before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is his separate

property.

Sec. 164. All other property acquired after marriage by either husband or wife, or both, including real property situated in this State, and personal property wherever situated, acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this State, is community property; but wherever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property. And in case the conveyance is to such married woman and to her husband, or to her and any other person, the presumption is that the married woman takes the part conveved to her, as tenant in common, unless a different intention is expressed in the instrument, and the presumption in this section mentioned is conclusive in favor of a purchaser or encumbrancer in good faith and for a valuable consideration. And in cases where married women have conveyed, or shall hereafter convey, real property which they acquired prior to May nineteenth, one thousand eight hundred eighty-nine, the husband, or their heirs or assigns, of such married women, shall be barred from commencing or maintaining any action to show that said real property was community property, or to recover said real property, as follows: As to conveyances heretofore made, from and after one year from the date of the taking effect of this act; and as to conveyances hereafter made, from and after one year from the filing for record in the recorder's office of such conveyances, respectively.

Sec. 172. The husband has the management and control of the community personal property, with like absolute power of disposition, other than testamentary, as he has of his separate estate; provided, however, that he cannot make a gift of such community personal property, or dispose of the same without a valuable consideration, or sell, convey, or encumber the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the wife or minor children that is community, without the written consent of the wife.

Sec. 172a. The husband has the management and control of the community real property, but the wife must join with him in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered; provided, however, that the sole lease, contract, mortgage or deed of the husband, holding the record title to community real property, to a lessee, purchaser or encumbrancer, in good faith without knowledge of the marriage relation shall be presumed to be valid, but no action to avoid such instrument shall be commenced after the expiration of one year from the filing for record of such instrument in the recorder's office in the country in which the land is situate.

SEC. 1401. Upon the death of the wife, the entire community property, without administration, belongs to the surviving husband, except such portion thereof as may have been set apart to her by judicial decree, for her support and maintenance, which portion is subject to her testamentary disposition, and in the absence of such disposition, goes to her descendants, or heirs, exclusive of her husband.

SEC. 1402. Upon the death of the husband, one half of the community property goes to the surviving wife, and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition, goes to his descendants, equally, if such descendants are in the same degree of kindred to the decedent; otherwise, according to the right of representation; and in the absence of both such disposition and such descendants, is subject to distribution in the same manner as the separate property of the husband. In case of the dissolution of the community by the death of the husband, the entire community property is equally subject to his debts, the family allowance, and the charges and expenses of administration.

Sections 164 and 172 were amended to read as above in 1917, and 172a was then added. The changes in section 164 then made are underlined. Prior to 1917 section 172 applied to all the community property and was amended only by the insertion of the word "personal." Section 172a imposes a limitation upon the power of the husband to alienate community real property.

While the statutes of California are in some respects similar to the community property laws of the other community property States, the rule established by the higher courts of that State is that during coverture the wife has no vested interest in the community property, her interest therein being a mere expectancy.

In Spreckels v. Spreckels (116 Cal., 339) [1897], the Supreme Court of the State held that prior to the amendment of 1891 to section 172 of the Civil Code, forbidding the husband to give away community property without consent of the wife in writing, the code vested in the husband all the elements of absolute ownership of the community property; that the wife's interest was a mere expectancy, and as to all the world except the wife, there was, prior to that amendment, no distinction between the community estate and the separate estate of the husband; and that the amendment could not be construed retroactively so as to deprive the husband of his vested right to dispose by gift of community property acquired prior to the amendment, without the consent of the wife.

In 1905 California passed an inheritance tax law, and subsequently the question was raised whether a widow should be compelled to pay such tax on that one-half of the community property that she took on the death of her husband. In the Estate of Moffitt (153 Cal., 359) [1908], the Supreme Court of California held that she did, since she had no vested

interest in the community estate and took her onehalf on the death of her husband as his heir.

This case was taken to the Supreme Court of the United States (Moffitt v. Kelly, 218 U. S., 400), where the judgment of the lower court was affirmed, the court laying down the rule that the nature and character of the right of the wife in community property for the purpose of taxation is a peculiarly local question, and the determination of the Staté court in regard thereto is not reviewable by the Supreme Court; and, further, that the law of California of 1905, taxing all property passing by will or intestacy, having been construed by the highest court of that State as applying to the wife's share of the community property, such tax is not in conflict with the contract, due process, or equal protection clauses of the Constitution.

Subsequently the inheritance tax law of California was amended to provide "that for the purpose of this act" the one-half of the community property which goes to the surviving wife on the death of her husband, under the provisions of section 1402 of the Civil Code "shall not be deemed to pass to her as heir to her husband, but shall for the purpose of this act, be deemed to go, pass, or be transferred, to her for valuable and adequate consideration."

It is obvious that this language does not change the rule of community property in the State nor vest in the wife any interest thereto prior to the dissolution of the community; rather it emphasizes the existing rule that the wife has no vested interest in community property.

As to the effect of section 172a of the Civil Code, enacted in 1917, it is not to be presumed that the legislature intended, by the enactment of same to make so revolutionary a change in the existing rule of property in California as to divest the husband of his ownership in the community property. As was said in Spreckels v. Spreckels, supra, "If a husband can not make a valid transfer of the property for the purpose of depriving his wife of it, that does not show a vested right in her;" and giving the fullest possible effect to the language, unless the wife had a vested interest by virtue of the law as it theretofore existed, which it must be conceded she did not, the operation of the amendment would necessarily be confined to community property acquired after May 23, 1917.

## SUMMARY.

Summarizing, it appears that in all of the community property States except California their own courts have held that the wife has, during the existence of the marriage relation, a vested interest in one-half of the community property. Her rights in the property of the community are perhaps nost fully recognized in the State of Washington, where both spouses have testamentary disposition over one-half of the community property, and where in the

absence of such disposition it descends to their issue, or, in the absence of issue, to the survivor; while the husband is manager of the community estate in Washington he may not sell, convey, or encumber real estate unless the wife join with him in the conveyance; and as was held in *Huyvaerts* v. *Roedtz*, ante, and Schramm v. Steele, ante, the separate debt of the husband can not be satisfied out of community property where it is not incurred in connection with the community business, nor for the benefit of the community.

In Idaho it is seen that the limitation upon the alienation of the community real property is the same as in Washington. But while the wife's earnings and the rents and profits of her separate estate are community property she is given the management and control of same. The Idaho rule governing the disposition of community property on the death of either spouse is, with minor variations, the same as that of Washington. In neither State is an inheritance tax payable on the one-half of the community that goes to the one spouse on the death of the other.

In Arizona the husband only may dispose of community personal property, but the wife must join him in deeds or mortgages affecting real estate, except unpatented mining claims. One-half of the community property is subject to the testamentary disposition of either spouse, and in absence of such disposition goes to his or her descendants; where there is neither testamentary disposition nor descendants, it is subject to distribution in the same manner as the separate property of the husband. On decree of divorce the court may divide the property as he sees fit, but in the absence of provision for the community property the parties from the date of the decree hold as tenants in common. The courts of Arizona hold that the wife is equal owner with her husband.

In Nevada the husband has the entire management and control of the community property, except that the wife has entire control of her earnings when living separate from her husband. Upon her death the husband takes the whole community estate, except that where he has abandoned her without good cause she may by will dispose of half and in absence of such disposition it goes to her heirs, exclusive of her husband. On the death of the husband the wife takes half and the husband may dispose of the other half by will, or it goes to his surviving children: if there is no will and no children survive, the whole goes to the wife without administration, subject to certain provisos. On dissolution of community by divorce for any other ground than adultery or extreme cruelty, the community property must be equally divided between the parties. The wife pays no inheritance tax under the inheritance tax law of Nevada on her interest in community property, the

courts holding that she takes not as heir but by a right vested in her at all times during marriage. It is to be noted that the Constitution of Nevada recognizes the wife's interest in community property.

In New Mexico while the husband is manager of the community estate, he may not transfer real property without a valuable consideration without the written consent of his wife; and under certain circumstances the wife may be substituted as manager; prior to 1915 he could not transfer community personal property except or a valuable consideration without her written consent; on dissolution of the community by the death of the wife the husband takes all except such portion as may have been set aside to the wife by judicial decree, which portion goes to her heirs unless she has disposed of same by will; on death of the husband one-half goes to the wife and the other half is subject to testamentary disposition by the husband. If he makes no will one-fourth of his one-half goes to the wife and the remainder to the children. On separation either may petition for division of community property and after divorce continue to hold as tenants in common where no disposition has been made in the divorce decree. New Mexico has no State inheritance tax act.

In Louisiana the community property comprehends all property acquired during the marriage by either husband or wife except that acquired with separate

funds or by inheritance or particular donation, and excepting the earnings of the wife when she is living separate from her husband; the husband is manager of the community but he may not convey community immovables by gratuitous title, and can not dispose of movables in fraud of the wife; either spouse may dispose of one-half the community property by will and the laws governing the descent of such property in the absence of testamentary disposition apply equally to both spouses, the survivor taking the deceased spouse's half by inheritance when there is no will, and neither father, mother or descendants. As heretofore stated the survivor pays no inheritance tax on his or her one-half of the community property but does pay on that part inherited from the deceased spouse.

In California the wife has no power of testamentary disposition of community property except of such as may have been set aside to her by judicial decree; she takes one-half as heir on the death of the husband; but on the death of the wife the entire community property belongs to the husband without administration. The California courts have held that under the law as it stood prior to 1917 the wife had no vested interest in community property prior to the dissolution of the marriage; the amendment to the inheritance tax act being limited to the purposes of that act could not have had the effect of vesting an interest in her, and had the addition of section 172a had that effect any amendment of the inheri-

tance tax act would have been unnecessary to exempt her one-half from taxation thereunder. In the case of *Blum v. Wardell*, now pending before the Circuit Court of Appeals of the Ninth Circuit, on appeal from the District Court of the Northern District of California, the application of the Federal estate tax act of 1916 is under consideration.

As appears from my opinion of September 10, 1920, in Texas the control of community property is divided between the husband and wife; in that State on the death of either spouse without issue the survivor takes the whole, and where there is issue, takes one-half, the other half going to said issue of their descendants. Under the State inheritance tax law the wife pays no tax on her half of the community property.

In Warburton v. White (176 U. S. 484, 496) the principle was enunciated that where State decisions have interpreted State laws governing property or controlling relations that are essentially of a domestic and State nature the United States Supreme Court will follow the State decisions if possible to do so, in the discharge of its duties. Also in De Vaughn v. Hutchinson (165 U. S. 566, 570) it was held that to the law of the State in which property is situated we must look for the rules which govern its descent, alienation and transfer, and for the effect and construction of wills and other conveyances. In United States v. Crosby (7 Cranch, 155) it was held that the title to land can be acquired and lost only in the

manner prescribed by the law of the place where same is situated.

In arriving at an answer to the questions propounded by you we are called upon to determine the rules of property in the community property States; we have therefore, pursuant to the rules of the above cases, adopted the rules laid down by the highest courts of the various States. There remains to be determined the application thereto, of the income and estate tax provisions of Federal statutes. In my previous opinion it was stated that since in Texas the ownership in one-half of all community property vests in each spouse, whatever is income to the community is income to both. This conclusion applies, therefore, to all States in which community property is held to be vested equally in both spouses.

Section 201 of the revenue act of 1916 and section 401 of that of 1918 impose a tax "upon the transfer of the net estate of every decedent" dying after the passage thereof, to be determined as is set forth in the sections following, which are:

Revenue act of 1918-

SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate.

(d) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent.

Subdvisions (a) and (c) of section 202 of the revenue act of 1916 are identical with subdivisions (a) and (d) of section 402 of the revenue act of 1918, quoted above.

While the community estate of husband and wife has not in the strictest sense all the incidents of a joint estate or an estate in the entirety as they were known at common law I am convinced that the community estate is for all practical purposes within the language of subdivision (d) of section 402, there being deductible therefrom, in arriving at the net estate of decedent the one-half interest of the surviving spouse which may be shown to have originally belonged to such person and never to have belonged to the decedent.

And even though it should be held that the community estate is not a "joint estate" or an "estate in the entirety" within the meaning of the revenue acts the one-half interest of the deceased spouse in community property would still be subject to tax under the language of subdivision (a) above.

My answers to your questions are therefore-

- (1) That in Washington, Arizona, Idaho, New Mexico, Louisiana, and Nevada the husband and wife domiciled therein, in rendering separate income tax returns, may each report as gross income, one-half of the income which under the laws of the respective States becomes, simultaneously with its receipt, community property.
- (2) In the States mentioned in answer to question 1 there should be included in gross estate in computing the estate tax of a deceased spouse, one-half only of the community property of husband and wife domiciled therein.
- (3) Neither of the above answers is based upon a statute enacted subsequent to March 1, 1913.
- (4) My answers to these questions apply under income and estate tax acts prior to the revenue act of 1918.

Respectfully,

A. MITCHELL PALMER, Attorney General.

Hon. David F. Houston,

Secretary of the Treasury,

Washington, D. C.

(T. D. 3568.)

Income Tax-Community Property.

Article 31, Regulations No. 62 (1922 edition), amended.

Treasury Department,
Office of Commissioner of Internal Revenue,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

Article 31, Regulations No. 62 (1922 edition), is hereby amended to include California, so that the fifth sentence will read as follows:

"A husband and wife domiciled in Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington, in rendering separate income tax returns, may each report as gross income one-half of the income which, under the laws of the respective States, becomes simultaneously with its receipt community property."

D. H. BLAIR, Commissioner of Internal Revenue.

Approved: March 26, 1924.

A. W. Mellon,

Secretary of the Treasury.

#### (T. D. 3569.)

Community property—California—Opinion of the Attorney General.

# 1. Income Tax—Community Property.

Under the laws of California a husband and wife in rendering separate income tax returns, may each report as gross income one-half of the income which becomes simultaneously with its receipt community property.

## 2. Estate Tax—Community Property.

Under the laws of California there should be included in the gross estate of a deceased spouse, for the purpose of computing the estate tax, one-half only of the community property of a husband and wife domiciled therein.

### 3. FORMER OPINION MODIFIED.

Former opinion of the Attorney General under date of February 26, 1921 (T. D. 3138) modified.

Treasury Department,
Office of Commissioner of Internal Revenue,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

The following opinion of the Attorney General under date of March 8, 1924, dealing with the right of husband and wife domiciled in California to divide certain of their income for the purposes of income tax, and as to the inclusion of community property in the gross estate of a deceased spouse, is published for your information and guidance. See, in this connection, T. D. 3138 and T. D. 3071.

D. H. BLAIR,

Commissioner of Internal Revenue.

Approved: March 27, 1924.

A. W. Mellon,

Secretary of the Treasury.

Department of Justice Washington.

March 8, 1924.

The Honorable,

The Secretary of the Treasury.

Sir:

Acknowledgment is made of your letter of December 12, 1923, requesting a reconsideration of an opinion of this Department dated February 26, 1921, which held inter alia that under the laws of California the wife has no vested interest in the community property and hence that portion of it which passes into her control upon her husband's death is subject to the federal estate tax imposed by the Revenue Act of 1916 as amended by the Act of 1917.

Your inquiry applies only to the portions of the former opinion (32 Ops. A. G. 435) which relate to community property in California.\*

<sup>\*</sup>Such portions are found from the third paragraph, page 454, to the summary on page 458 and paragraph one on page 461 of the opinion.

In brief the question, as you put it, is, whether any "modification is necessary in the opinion previously rendered, as to the effect of the change made in the California Inheritance Tax Act in 1917, or does the previous opinion stand"?

The conclusions in the former opinion were based on the assumption that

"the California courts have held that under the law as it stood prior to 1917 the wife had no vested interest in community property prior to the dissolution of the marriage;"

and hence reasoning from such a premise it decided that the amendments to the California Code passed in 1917 exempting the wife's share of the community property from inheritance tax, (chap. 589 Stat. Cal. 1917, p. 880) and the further restrictions imposed in 1917 upon the husband in the management of the community property (Sec. 172a, Civil Code of California) did

"not change the rule of community property in the state nor vest in the wife any interest thereto prior to the dissolution of the community".

As will later appear from a review of judicial opinions, it is doubtful whether the assumption of the holding of California courts could be so conclusively stated. But since February, 1921, when that opinion was promulgated by this Department, three new elements have entered into this question:

(a) The Federal Circuit Court of Appeals for the 9th Circuit, in the case of Wardell v. Blum

(276 Fed. 226) has decided contrariwise, holding that the change in the California Inheritance Tax Law was "manifestly a clear statutory declaration that the wife's half of the community property is not a part of the property of the deceased husband "and although the act of the legislature could of course in terms apply only so far as State Inheritance taxes are concerned, it nevertheless "settles the question \* \* against the Government". The Federal Circuit Court further concludes that even were the case not controlled by the California Inheritance Tax amendment, the rule of law announced by the Supreme Court of the United States in Arnett v. Reade, 220 U. S. 311, would compel the same exemption for the wife, for "it is very plain that the wife hos a greater interest than the mere possibility of an expectant heir", and the Federal Estate Tax Act (Secs. 201-2-3, 39 Stat. 777) only attempts to tax the decedent's estate. The Supreme Court of the United States refused to review his decision by denying the Government's petition for a writ of certiorari March 6, 1922 (258 U. S. 617).

(b) The legislature of California has continued to pass amendments to its Community Property Laws, which, much more conclusively than those of 1917, can only be explained by a legislative recognition of an existing property right of the wife in community property. (See California Statutes, 1923, pp. 29, 30.)

(c) The Supreme Court of California on August 17, 1923 handed down a decision in Roberts v. Wehmeyer (218 Pac. 22) affirming the conclusions of the Federal Court in the Blum case supra, as far as the effect of the 1917 Amendment to the Inheritance Tax is concerned, but in so far as the opinion relied on Arnett v. Reade supra as proof that a wife had at all times had an interest or estate in the community property they felt "constrained to disagree with it". Commenting upon the fact that the United States District Court in the Blum case had decided "unqualifiedly" that Section 172a of the Civil Code recognizes in the wife a "valid subsisting vested interest and estate in the community property during the life of the husband", the California Supreme Court said. "We need express no opinion of the decision of the United States District Court, for as we have already held, Section 172a has no application to the property involved in the case at bar".

Hence, we are faced with a conflict of authorities in the following situations:

The United States District Court for the Northern District of California, and the United States Circuit Court of Appeals for the Ninth Circuit have decided that the wife, upon the death of her husband, free of Federal or State Inheritance Tax Obligation, comes into possession of her half of the community property, not as his heir, but by virtue of her valid vested interest in the community es-

tate, which California Statutes of 1917 recognize and protect. In what is probably only a dictum the Supreme Court of California expresses approval of the wife's tax exemption by the Federal Court, but specifically withholds judgment as to whether the 1917 Amendments to the Community Property Laws of California give her a vested interest.

You are following an opinion of the Attorney General furnished you February, 1921 holding that the half of the community property which she takes at her husband's death passes to her as to an heir and subject to the Federal Estate Tax of 1916 as amended by the Revenue Act of 1917.

Manifestly both interpretations cannot stand, and it is my opinion that the former opinion of this Department must be modified to harmonize with the decision of the Federal Circuit Court of Appeals in the case of Blum v. Wardell, for the following reasons:

The question turns on what the real nature of a wife's interest is in the community estate according to the laws of California. In every other state where the Community Property System prevails the wife's interest is recognized as a vested property right. One line of California decisions has described her merely as an "heir expectant" of her husband and if these decisions are the only source of enlightenment on this subject, the reasoning in Blum v. Wardell must fail. But there is another course of judicial opinion equally traceable through-

out the California Supreme Court Reports, which recognizes her property interest in community gains.

These two theories have played back and forth across the field of judicial interpretation in California and no real analysis of the question can be made by ignoring the "score" of either.

In addition to what the courts have said, the Constitution, and the provisions of the Civil Code of California have maintained a practically parallel statutory course with those of other community property states whose courts unhesitatingly affirm her property right.

Particularly must the numerous amendments to the California Law passed since 1917 be analyzed as bearing on the intent of the legislature to protect what some California decisions had failed to recognize—the vested interest of the wife in community estate.

Provisions of the California Law: the diverging lines of cases bringing judicial interpretation up to 1917; and the legislative enactments since 1917 as bearing on the conclusions of the Federal Court in the Blum v. Wardell case, will in turn be considered.

#### Laws of California.

The Constitution of California, adopted in 1849, contained this significant provision, Art. XI, Sec. 14:

"All property, both real and personal, of the wife, owned or claimed by her before marriage,

and that acquired afterward by gift, devise, or descent, shall be her separate property, and laws shall be passed more clearly defining the rights of the wife in relation as well to her separate property as to that  $held^*$  in common with her husband. Laws shall also be passed providing for the registration of the wife's separate property."

In 1850 the First Legislature of California met and from it we find a definition of what was meant by property "held in common with her husband", (see Statutes of 1850, p. 254, et seq.) where separate and community property are separately described and it was provided that "upon the death of either husband or wife one half of the common property shall go to the survivor" and "in case of dissolution of the marriage by divorce \* \* \* the common property shall be equally divided between the parties". The husband was given full power of management and control of the property during existence of the marriage.

Subsequent legislatures of California have added safeguards for protecting the rights of the wife by setting up checks on the husband's absolute control of it, but no legislative enactment had disturbed the community property system.

In 1861 Section 11 (supra) of the Statutes (pp. 310-11) was amended to make all of the community property go to the surviving husband upon the death of the wife, but still the distinction of his ownership in only half was preserved by leaving

<sup>&</sup>quot;Italics ours.

half of it, only, subject to his testamentary disposition.

In 1863-4 again the Legislature amended Section 11 (Stats. 1863-4, p. 363) to allow the entire common property upon the death of the wife to go to the husband without administration.

In 1872 and 1874 the laws of California were codified and again we find embedded in the code, and never subsequently changed the clear distinction of community interest recognized as a species of property ownership of each spouse.

The pertinent sections of the Civil Code of California follows:\*

"Sec. 682. Ownership of several persons. The ownership of property by several persons is either:

- 1. Of joint interests;
- 2. Of partnership interests;
- 3. Of interests in common;
- 4. Of community interest of husband and wife.

"Sec. 687. Community Property. Community property is property acquired by husband and wife, or either, during marriage, when not acquired as the separate property of either. during marriage, when not acquired as the separate property of either.

"Sec. 161. May be Joint Tenants. A husband and wife may hold property as joint tenants, tenants in common, or as community property.

"Sec. 162. All property of the wife, owned by her before marriage, and that acquired af-

<sup>\*</sup>I irsert all italics in statutes set out hereafter, for convenient emphasis.

terwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is her separate property. The wife may, without the consent of her husband, convey her separate property.

"Sec. 163. All property owned by the husband before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is his separate property.

"Sec. 164. All other property acquired after marriage by either husband or wife, or both, (including real property situated in this State, and personal property wherever situated, acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this State,)\*\* is community property; but wherever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property. And in case the conveyance is to such married woman and to her husband, or to her and any other person, the presumption is that the married woman takes the part conveyed to her, as tenant in common, unless a different intention is expressed in the instrument, and the presumption in this section mentioned is conclusive in favor of a purchaser or encumbrancer in good faith and for a valuable consideration. And in cases where married women have conveyed, or shall hereafter convey, real property which they acquired prior to May nineteenth, one thousand eight hundred and eighty-nine, the husband, or their heirs or assigns, of such married women, shall be barred from commencing or maintaining any action to show

<sup>\*\*</sup>Part in brackets was added in 1917.

that said real property was community property, or to recover said real property, as follows: As to conveyances heretofore made, from and after one year from the date of the taking effect of this act; and as to conveyances hereafter made, from and after one year from the filing for record in the recorder's office of such conveyances, respectively.

"Sec. 1401. Distribution of the common property on the death of the wife. Upon the death of the wife, the entire community property, without administration, belongs to the surviving husband, except such portion thereof as may have been set apart to her by judicial decree, for her support and maintenance, which portion is subject to her testamentary disposition, and in the absence of such disposition, goes to her descendants or heirs, exclusive of her husband.

"Sec. 1402. Distribution of common property on death of husband. Upon the death of the husband, one-half of the community property goes to the surviving wife, and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition goes to his descendants, equally, if such descendants are in the same degree of kindred to the decedent; otherwise, according to the right of representation; and in the abscence of both such disposition and such descendants, is subject to distribution in the same manner as the separate property of the husband. In case of the dissolution of the community by the death of the husband, the entire community property is equally subject to his debts, the family allowance, and the charges and expenses of administration."

Note. Sections 1401-1402 have been amended by the legislatures of 1919 and 1923. The 1919 Amendment providing that the wife may dispose of her half of the community property by will was repealed by referendum vote. But the Amendment of 1923 failed of referendum submission, and stands as the last amendment to the Community Property Law. It is significant that it, too, restores to the wife testamentary powers over one-half the community property. As amended therefore Sections 1401 C. C. and 1402 C. C. now read:

"1401. Upon the death of either husband or wife, one-half of the community property belongs to the surviving spouse; the other half is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse, subject to the provisions of section one thousand four hundred two of this code.

Community property passing from the control of the husband, either by reason of his death or by virtue of testamentary disposition by the wife, is subject to administration, his debts, family allowance and the charges and expenses of administration; but in the event of such testamentary disposition by the wife, the husband, pending administration, shall retain the same power to sell, manage, and deal with the community personal property as he had in her lifetime; and his possession and control of the community property shall not be transferred to the personal representative of the wife except to the extent necessary to carry her will into effect. After forty days from the death of the wife, the surviving husband shall have full power to sell, lease, mortgage or otherwise deal with and dispose of the community real property, unless a notice is recorded in the county in which the property is situated to the effect that an interest in the property, specifying it, is claimed by another under the wife's will.

"Sec. 172. The husband has the management and control of the community personal property, with like absolute power of disposition, other than testamentary, as he has of his separate estate; (provided, however, that he can not make a gift of such community personal property or dispose of the same without a valuable consideration, or sell, convey, or encumber the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the wife or minor children that is community, without the written consent of the wife.)<sup>2</sup>

"Sec. 172a." The husband has the management and control of the community real property, but the wife must join with him in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered; provided, however, that the sole lease, contract, mortgage or deed of the husband, holding the record title to community real property, to a lessee, purchaser or encumbrancer, in good faith without knowledge of the marriage relation shall be presumed to be valid; but no action to avoid such instrument shall be commenced after the expiration of one year from the filing for record of such instrument in the recorder's office in the county in which the land is situate."

<sup>1.</sup> Word "personal" inserted in 1917.

<sup>2.</sup> From "'provided" to end of section was added by the amend-

<sup>3.</sup> All of Section 172a added in 1917.

In view of the restrictions placed on the husband's control of community property by Sections 172 and 172a, it is difficult to see how the judicial mind can conceive of his possessing the elements of absolute ownership over the community estate, particularly in face of Section 679 of the Civil Code which provides:

"The ownership of property is absolute when a single person has the absolute dominion over it, and may use it or dispose of it according to his pleasure, subject only to general laws."

Section 680 of the Civil Code provides:\*

"The ownership of property is qualified:

1. When it is shared with one or more persons;

2. When the time of enjoyment is deferred or limited:

3. When the use is restricted."

Section 682 supra is to be remembered in this connection as classifying one *kind* of *ownership* as "community interest of husband and wife".

"Sec. 694. A future interest is vested when there is a person in being who would have a right, defeasible or indefeasible, to the immediate possession of the property upon the ceasing of the intermediate or precedent interest."

To relieve the surviving wife of inheritance tax on *her share* of the community property to which she comes into possession at the death of her hus-

<sup>&</sup>quot;Italies added.

band, the California Legislature of 1917 enacted inter alia the following (Chap. 589 State of California, 1917, p. 880):

"Sec. 1. \* \* \* (2) The words 'estate' and 'property' as used in this act shall be taken to mean the real and personal property or interest therein of the testator, intestate, grantor, bargainor, vendor, or donor passing or transferred to individual legatees, devisees heir, next of kin, grantees, donees, vendees, or successors, and shall include all personal property within or without the state; provided, that for the purpose of this act the one-half of the community property which goes to the surviving wife on the death of the husband, under the provisions of section one thousand four hundred two of the Civil Code, shall not be deemed to pass to her as heir to her husband, but shall, for the purpose of this act, be deemed to go, pass or be transferred to her for valuable and adequate consideration and her said one-half of the community shall not be subject to the provisions of this act; \* \* \*"

If Sections 682 and 697 of the Civil Code mean anything, then the husband's interest in the community property cannot be exclusive, but only qualified and partial. It requires his wife's interest to be added to his to convey the sum total title, else paragraph 4 of Section 682, Section 161, Sections 1401-2 as amended in 1917, Section 679, Section 680, Sections 172 and 172a of the Civil Code are meaningless, in the light of Section 700 of the Civil Code which provides:

"A mere possibility such as the expectancy of an heir apparent is not to be deemed an interest of any kind."\*

<sup>&</sup>quot;Italics added.

And again Section 1045 of the Civil Code clinches the matter:

"A mere possibility, not coupled with an interest, cannot be transferred."

The legislature of California must be presumed to have known Sections 700 and 1045 when it passed the more recent amendments requiring the wife to furnish written consent for her husband to give away the community property (1891); when it required her to join in sales or leases conveying any interest in the community real property (1917); when it permitted her to make a will (1921); and when it exempted her share of the community property from inheritance tax on the ground that she took it as a purchaser and not as heir (1917).

From the first rough days of the Convention of '49 when plans for the formation of a state government in California were laid the constitution and statutes have recognized and preserved a community property system, practically the same as that which prevails in other community property states.

So much for the constitutional and statutory marital property laws of California. Both are clear, and plainly bottomed upon a recognition of a property interest in the wife.

DECISIONS OF CALIFORNIA COURTS.

(a) Heir Expectant Theory.

Now to examine into the courts' "interpreta-

tions" or descriptions of what the wife's interest is;—there we enter a sea of uncertainty! As pointed out above the decisions diverge, and from the date of divergence progress down to the present time, along two different paths in the shape of a "Y".

Until 1860, in the case of Van Maren v. Johnson, (15 Calif. 308) the courts recognized a vested property interest in the wife to half of the community estate, though her husband had full control and management of it as agent of the "gananciales". (1855, Beard v. Knox, 5 Cal. 252; 1857, Buchanan Estate, 8 Cal. 507; 1859, Smith v. Smith, 12 Cal. 216; 1859, Meyer v. Kinzer, 12 Cal. 247). Then, Judge Field, in the Van Maren case, quoting inaccurately from a Louisiana case, long obsolete, started by way of dictum a new theory of Community property, saying:

"The interest of the wife is a mere expectancy like the interest which an heir may possess in the property of his ancestors."

This decision is followed in several decisions (Packard v. Arellanes 1861, 17 Cal. 525; Greiner v. Greiner 1881, 58 Cal. 115; In re Roland 1888, 74 Cal. 523) until Justice Temple in In re Burdick, 112 Cal. 387, and in Spreckels v. Spreckels (1897) 116 Cal. 339, fastened it so deeply into judicial jurisprudence that henceforth it is termed in cases following its reasoning, as a "rule of property" and it thereafter assumes the force of stare decisis.

In the Burdick case it was decided that both husband and wife take their shares in community property "as an heir" of the other, which is of course absurd, as then who would own the community estate?

In Spreckels v. Spreckels, 116 Cal. 345, the statement that the wife's right is but a mere "expectancy" emphatically appears but it is again dictum. In 1891 Sec. 172 of the Civil Code has been amended to make the wife's consent in writing necessary to validate a gift of community property from the husband. All the property involved in the Spreckels case was acquired before the amendment and Justice Temple's opinion held that prior to 1891 the husband had been sole owner, and hence the amendment could not take away property once vested in him. It did not decide whether property accumulated since 1891 would vest in both husband and wife as community property.

Since that time a number of cases (Sharpe v. Loupe, 120 Cal. 89; Cunha v. Hughes, 122 Cal. 111) have relied upon the statement that the wife "takes as an heir" but none have directly decided the question raised, but left undetermined by Justice Temple, as to whether the effect of the amendment to Sec. 172 on property acquired since 1891 was to recognize, as to it, the property interest of the wife.

In 1916 the court in the later Spreckels v. Spreckels case, 172 Cal., 780, reaffirms the prior dictum as a "rule of property" that the wife "takes as an heir," but it, too, was only concerned with property acquired prior to the amendment of 1891.

In 1917 the Supreme Court in Dargie v. Patterson, 176 Cal. 714, granted relief to a surviving widow who sued to recover property conveyed by her husband, as a gift, to which she had not assented in writing. Of course since her husband was dead, her title to the community property would not be questioned by either those who think she has nothing until her husband dies-or by those who favor her vested interest at all times. but the decision is important in two respects, other than the approval by way of dictum again of the "heir expectancy" theory. It upholds the amendment of 1891 to Section 172, saying a widow is entitled to "avoid the conveyance so far as is necessary for the protection of her interest in the property conveyed".1 But whether the power thus given by the amendment can be used by a wife until her husband dies, the court says: "there is no occasion to decide here".

This brings in review all the decisions2 down to

<sup>1</sup> Italics ours.
2. It is not deemed necessary here to review Estate of Moffitt, 153 Cal. 359 (1908) since following the theory that the wife took her half of the community property as her husband's heir, it construed the wife's share of community property liable for state inheritance taxes, and a special statute passed in 1917 repudiated the Moffitt decision and set up a contrary rule to the effect that the wife takes as a purchaser, at least in so far as inheritance taxes are concerned.

1917, which held that the wife had no vested interest, but took only as an heir. In 1917, as has been shown, numerous significant legislative changes occurred, most of which would be idle if the wife has no property rights in common property during her husband's life.

### (b) Vested Interest Theory.

While the above cases were accumulating, there was another line of decisions that followed the early interpretation well rooted in 1860, before the Van Maren offshoot occurred. These "regular" decisions, regular in that they do not offend the growth of legislative enactments, and regular also in that they harmonize with decisions from other state maintaining community property systems with very similar basic laws, appear in great numbers throughout the California reports, down to 1920. They all follow the early case of Beard v. Knox, 5 Cal. 252, which clearly stated:

"The husband and wife, during coverture, are jointly seized of the property, with a half interest remaining over to the wife, subject only to the husband's disposal during their joint lives. This is a present, definite, and certain interest, which becomes absolute at his death, so that a disposition by devise, which can only attach after death of the testator, cannot affect it, for such a conveyance can only operate after death, upon the very happening of which, the law of this state determines the estate, and the widow becomes seized of one-half of the property."

This case has been quoted approvingly and followed strangely enough afterward by the same Justice who in the insurgent opinion in the Van Maren case sowed the dragon's teeth of confusion in the whole subject. A year later he seems to return to earlier convictions, for in 1861, in Payne v. Payne, 18 Cal. 301, Justice Field says:

"Such was the construction given by this Court in Beard v. Knox, 5 Cal. 252 \* \* \* \* plaintiff took one undivided half of the common property in her own right by virtue of the community existing between herself and husband."

Again in 1865, in Morrison v. Bowman, 29 Cal. 337, conclusions in both former cases were reaffirmed and followed. See also Galland v. Galland, 38 Cal. 265, in which the Court says the wife "has a *joint and equal* interest with the husband in all property acquired during the marriage".

In In re Gilmore, 81 Cal. 240, the long line of previous cases, including Beard v. Knox, supra, is reviewed with approval, the Court arriving at the conclusion that the wife takes her half of the community property "as survivor of the matrimonial community".

It is an interesting fact that in all this line of decisions no notice is taken of the other smaller but growing branch springing from the Van Mar-

Italies ours.
 De Godey v. Godey, 39 Cal. 157, Estate of Silvey, 42 Cal. 210, King v. La Grange, 50 Cal. 332, Estate of Frey, 52 Cal. 660, Estate of Stewart, 74 Cal. 98, Noe v. Splivalo, 54 Cal. 207.

ren v. Johnson case until in 1895 Justice McFarland in the case of Directors of Abila, 106 Cal. 362, speaking of the wife's interest in the community, said:

"It has sometimes been defined as a mere expectancy, like the interest which an heir may possess in the property of his ancestor (Van Maren v. Johnson, 15 Cal. 312; Greiner v. Greiner, supra; People v. Swalm, 80 Cal. 49); although it is no doubt more tangible than the mere expectancy of a general heir."

The Estate of Wickersham, 138 Cal. 355, challenges attention because it was decided in 1902 after the Burdick and the first Spreckels cases had been handed down, and, indeed after two other<sup>3</sup> decisions had also given expression to the statement that the wife's interest was but that of "an heir expectant". Strangely enough it does not mention any of the "expectant heir" cases, but it goes clear back along the other track of reasoning to Beard v. Knox, citing it and all the "regular" decisions, following them as authority, and using the expression "her title" to describe the widow's interest in one-half of the community property.

(See also Estate of Prager, 166 Cal. 453). In the Estate of Rossi, 169 Cal. 149, the Court decides:

"The widow will take one-half of the community property by virtue of survivorshop."\*

<sup>2.</sup> Italies added.

<sup>3.</sup> See Sharpe v. Loupe, 120 Cal. 89; Cunha v. Hughes, 122 Cal. 111.

In 1919 in the Estate of Brix, 181 Cal. 676, these interesting facts are deduced from the statutory law relative to community property:

"If a divorce is granted without any disposition of the community property the former wife becomes the owner of one-half of the community property as tenant in common with her former husband."\*

And yet, if she had nothing, but "the interest" of an heir expectant, how can she, without court decree, or deed of any kind, suddenly have title to an undivided half interest in their common estate? The Supreme Court further decides that:

"To remove \* \* \* this power of the wife to control, object or interfere may be a consideration of very great pecuniary value to the husband and fully adequate for a transfer of valuable real estate."\*

Yet how can that be harmonized with the provision of law (C. C. 700) that an expectancy of an heir apparent is not an interest of any kind?

Finally, in Schneider v. Schneider, 183 Cal. 335, in 1920, the Supreme Court of California in upholding a division of the community property acquired during a "common law" marriage, utterly ignoring the Burdick and both Spreckels cases, pointedly recognized the dual property interest of both the spouses in the community acquests by saying:

"How then can it be that where the property is acquired by the joint labors of both,

<sup>\*</sup>Italics added.

each in the eye of the law contributing onehalf thereto, it shall belong only to the husband?"

It is a disquieting circumstance, but nevertheless one with which we must reckon, that these two lines of decisions have developed contemporaneously but their reasoning has seldom crossed. The Court has, when adhering to the one theory, made little effort to explain, overrule, or modify the other, and with a few noted exceptions, when holding that the wife took only "as an heir" it has ignored the cases protecting her "property interests" or deciding that she comes into possession of her half as "the survivor" of the community. Inconsistencies have thus arisen:

The "heir expectant" theory was first announced by way of dictum (Van Maren case) and much of its most persuasive argument is spread in opinions as dicta (In re Burdick and both Spreckels cases).

The early Spreckels case positively stated that the husband had absolute and exclusive ownership of only the community property which had been acquired prior to 1891. It raised the question but did not decide whether the wife might have more than the expectancy of an heir in property acquired after the amendment of 1891.

The reasoning of the court in the Burdick and Spreckels cases arose from the fact that when the property involved in those cases was acquired the husband had *sole* management and disposition of the community estate. Beginning with 1891, he has had less and less control.

The Supreme Court of the United States in the cases of Warburton v. White, 176 U. S. 484, and Arnett v. Reade, 220 U. S. 311, held that it was a

"misconception of the system to suppose that because power was vested in the husband to dispose of the community acquired during marriage, as if it were his own, therefore by law the community property belonged solely to the husband".

In reply to contentions urged from the reasoning in Spreckels v. Spreckels, supra, the Supreme Court of the United States said in Arnett v. Reade, supra:

"However this may be, it is very plain that the wife has a greater interest than the mere possibility of an expectant heir. For it is conceded by the Court below and everywhere we believe, that in one way or another she has a remedy for alienation made in fraud of her by her husband."

The only real time the Supreme Court of the State of California reviewed both kinds of decisions, and taking them into consideration, nevertheless refused to follow the "vested interest" group, following rather as a "rule of property" the "heir expectant" line, was in the case of In re Moffitt Estate, 153 Cal. 359. And the legislature of California passed an act in 1917 repudiating the Moffitt decision.

Under such conditions, in 1920 the question enters the arena of the Federal courts in the case of Blum v. Wardell, 270 Fed. 309, where suit was brought to recover Federal Estate taxes paid under protest on the wife's share of the community property at the probate of the husband's estate. After a review of the Mossitt decision and many of its forerunners that held that the wife's share came to her as heir of her husband, District Judge Rudkin decided, that "assuming that a fixed or decided rule can be gathered from the decided cases", the tax legislation of 1917 necessarily changes such a rule of decision for,

\* "the amendment to the inheritance tax law of the state is a legislative disapproval of the decision in the Moffitt case. The community property act of 1917 is valid as to community property acquired before its passage (Arnett v. Reade, supra), and if that act does not recognize in the wife a valid subsisting vested interest and estate in the community property during the life of the husband. language is without meaning and legislation without avail.1 When the husband had the management and control of the community property with the like absolute power of disposition as of his own separate estate2, a decision that the wife had a mere expectancy was plausible if unsound. But under these recent acts such a decision would be without excuse or justification."

The Circuit Court of Appeals, 276 Fed. 226, upheld the District Court in the Blum decision on

<sup>1.</sup> Italics added.

<sup>2.</sup> This was true prior to the amendment of 1891.

the ground that the California Inheritance Tax Amendment of 1917, "manifestly is a clear statutory declaration that the wife's half of the community property is not part of the property of the deceased husband", and "even if the case were not controlled by the California statute of 1917 \* \* \* applying the rule of law announced by the Supreme Court of the United States in the case of Arnett v. Reade, 220 U. S. 311, 320, the result, it seems to us, must be the same".

It has been suggested that the above decisions of the Federal Courts fail to follow the construction placed upon the laws of California by the highest Court of the state, but that contention is hardly sound. There is less justification for assuming that the line of decisions started by the Van Maren case is any more truly "the construction" of the highest Court of the state than the long line of estate decisions which hold that the wife takes her half as a survivor of the community, or than the uninterrupted line of cases arising out of divorce, where even when the Court's decree is silent as to a division of community property she is recognized as becoming a tenant in common with her former husband as soon as the marriage is dissolved.

Two decisions have been handed down by the Supreme Court of California since Blum v. Wardell.

The first, the Roberts v. Wehmeyer, supra, case, militantly upholds the heirship doctrine, but it leaves open the question of the effect of the 1917 amendments to the California Community Property laws. Furthermore it increases rather than dispels the fog of doubt about the question, for while approving the Blum v. Wardell opinion in so far as it lifted the burden of inheritance tax from the wife's share, which it will be noted was done because the Circuit Court of Appeals recognized the amendment of 1917 as "manifestly a clear declaration" that the wife did not take as an heir, the California Court nevertheless repudiates the doctrine of her "vested interest" on which the Federal Court's reasoning was based, as following the Supreme Court of the United States in Arnett v. Reade.

The most recent expression from the Supreme Court of California is from the case of Taylor v. Taylor (66 Cal. Dec. 338) decided September 14, 1923, where, discussing the right of the wife to contest the husband's *ownership* of community property withheld from her, it said:

"If it be contended that any of the findings tend to suggest the conclusion of law that the defendant is the sole and exclusive owner of the land in controversy, they are contrary to the undisputed evidence, \* \* \* that whatever interest he had in the property at the time of the Nevada divorce was obtained from money acquired after his marriage with apellant \* \* it would seem to necessarily

follow that the divorce of the parties having been granted without any disposition of the community property, appellant is the owner of one-half of such property as tenant in common with respondent (Estate of Brix, 181 Cal. 667)."

Judicial pronouncements, therefore, remain in substantially the same divided camps in California now as they were in 1920 when the Federal Court decided the Blum case which must, therefore, be regarded as announcing the true rule, that "the wife has a greater interest than the mere possibility of an expectant heir' in community property, and that the California statutes of 1917 clearly recognize that the wife's half of community property is not a part of the property of the deceased husband. That interpretation offends only the doctrine announced in, and perpetuated from, the Van Maren case, but which I think cannot be regarded as a "fixed rule of decision in the State of California". In fact I am of opinion no established rule can be gathered from the decided cases in that The conclusion I have announced above, as based on the Blum decision is, however, in harmony with decisions of the Courts of other states\* where the community property system is maintained, and with pronouncements of the Supreme Court of the United States.1 It further gives validity and a

<sup>\*</sup>La Tourette v. La Tourette, 15 Ariz. 200; \*La Tourette v. La Tourette, 15 Ariz. 200; Ewald v. Hufton, 31 Idaho 373; Succession of Marshal, 118 La. 211; Beals v. Ares (Arizona, 1919), 185 Pac. 780; In re Williams, 40 Nev. 241; Mabie v. Whitaker (Washington), 39 Pac. 172. L. Warburton v. White, 176 U. S. 484; Arnett v. Reade, 220 U. S.

<sup>311.</sup> 

reasonable construction to recent acts of the California legislature;2 and recognizes and follows a line of California decisions beginning in 1855<sup>8</sup> and continuing to September, 1923, in the last decision of the Court on this subject (Taylor v. Taylor, supra).

The former opinion of this Department is, therefore, amended accordingly.

Respectfully.

H. M. DAUGHERTY. Attorney General.

<sup>2.</sup> Civil Code, Sec. 172a (1917); Amendments (1923) to C. C. 1401 & 1402; and Chap. 589, Law of California 1917, p. 880.
3. Beard v. Knox, supra.
4. Note especially de Godey v. Godey et al., 39 Cal. 157; Estate of Silvey, 42 Cal. 210; Estate of John Gwin, 77 Cal. 313; In re Gilmore, 81 Cal. 240; Estate of Wickersbam, 138 Cal. 355; Estate of Prager, 166 Cal. 453; Estate of Rossi, 169 Cal. 149, in every one of which the doctrine of the Beard v. Knox case is relied upon for authority and reaffymed. authority and reaffirmed.

(T. D. 3670.)

### OFFICE OF THE ATTORNEY GENERAL.

Washington, D. C.

January 27, 1925.

Honorable Andrew Mellon,

The Secretary of the Treasury.

My dear Mr. Secretary:

In reply to your inquiry I have to say that my opinion of October 9th relating to Community Property in California treats only of the incidence of estate tax upon the wife's share of such community property of which she assumes possession at her husband's death. In no way does it touch upon the question as to whether the husband and wife may make separate returns of the income from their community estate. That phase of the matter is therefore as open as it ever was in California and you are free to litigate it by appropriate legal proceedings.

In view of the large amount involved and the uncertainty in which this phase of the matter now stands you should, in my opinion, be left free to litigate the question if, in your judgment, the public interest would be served by a judicial determination of it. In any such litigation, argument that the same rule must apply to California because it has been applied in other States will, of course be advanced because of the several years acquiescence to this view by your Department. If, however, you decide to litigate this point with respect to in-

come from community property in California, this Department will render you such assistance in the litigation as you may desire from the United States Attorney's Office or any branch of the Department of Justice, and it will do everything possible to bring such litigation to a speedy conclusion.

Sincerely yours,
(Signed) HARLAN STONE,
Attorney General.

# DEPARTMENT OF JUSTICE Washington.

OPINION OF ATTORNAY GENERAL.

October 9, 1924.

My dear Mr. Secretary:

On March 8, 1924, the Attorney General rendered an opinion to the Secretary of the Treasury with respect to the application of the Federal Estate Tax Law to Community Property under the laws of California upon the death of either spouse. In that opinion the history of the law of Community Property, as disclosed by the Statute Law and judicial decisions, in the State of California was reviewed at length and the conclusion was reached that the interest acquired in the Community Property by the husband or wife upon the death of the other spouse was not subject to Federal Estate Tax in accordance with the decision of the Circuit Court of Appeals for the 9th Circuit in Blum v. Wardell, 276 Fed. 226.

On the 27th day of May, 1924, the Attorney General, in response to a request of the Secretary of the Treasury, recalled this opinion for further consideration and review. The precise question under consideration was decided in the case of Blum v. Wardell, supra. This case arose under the Revenue Act of September 8, 1916 (39 Stat. 756) as amended in 1917 imposing a tax on the transfer of the net estate of a decedent. The amendment of 1917 affected only the rate of tax. Section 202 of the Act of 1916 provided that the value of the gross estate of the decedent should be determined by including the value, at the time of his death, of all property, real or personal, tangible or intangible, wherever situated:

"(a) to the extent of the interest therein of the decedent at the time of his death, which, after his death, is subject to the payment of the charges against his estate and the expenses of its administration, and is subject to distribution as part of his estate. " ""

Section 203 provided that, for the purpose of the tax, the value of the net estate should be determined by making certain deductions, including such other charges against the Estate as are allowed by the laws of the jurisdiction, whether within or without the United States.

In this case Moses Blum had died leaving a widow who, under the Community Property Law of California, was entitled to one-half of the community property. The portion to which the widow

was entitled had been taxed under the provisions of the Estate Tax Law and the suit was brought to recover from the Collector of Internal Revenue the amount of that tax. The District Court sustained the contention of the plaintiff that her interest in the community property was not subject to tax (270 Fed. 309) and the Circuit Court of Appeals affirmed the District Court (276 Fed. 226); the decision of the Circuit Court of Appeals being rendered on October 24, 1921.

On January 20, 1922 the Solicitor General filed in the Supreme Court a petition for *Certiorari* which that court denied on March 26, 1922. Under the provisions of the Judicial Code, a decision by the Circuit Court of Appeals is final in cases of this class unless the Supreme Court grants *Certiorari*.

On April 7, 1922, the Solicitor General made a motion in the Supreme Court to revoke the order denying the petition for Certiorari and to allow the petition to remain unacted upon until the Supreme Court of California had decided the case of Roberts v. Weymeyer, 218 Pac. 22, then pending before it. The theory of that motion was that the Supreme Court of California, in deciding Roberts v. Weymeyer, had before it a question involving the nature of the interest of the wife in Community Property and that in the event of a decision by that court upon this point of California law, favorable to the contentions of the Government in Blum v. Wardell,

grounds would exist for a reconsideration of the petition in that case for a Writ of Certiorari. That motion remained pending in the Supreme Court until after the decision of the Supreme Court of California in Roberts v. Weymeyer when in October, 1923, it was withdrawn by the Solicitor General. In his motion for leave to withdraw the motion, the Solicitor General distinctly intimated that in another case and in a more usual method of procedure, the United States might raise the question at issue if so advised.

We thus have a situation wherein the precise question passed upon by the Attorney General in his opinion of March 8, 1924, has been litigated in the Federal courts to final judgment. The Government has exhausted its resources in that litigation to secure a judicial review of the question and that question has been finally judicially determined, so far as that litigation is concerned, adversely to the contentions of the Government.

In making this statement, I do not accept as valid the suggestion frequently made in connection with this case, that the Supreme Court of the United States, by denying the petition for Writ of Certiorari, affirmed the decision of the court below or passed upon the merits of the question. It is well settled that a denial of a petition for a Writ of Certiorari does not involve any judicial review of the merits of the case in which the petition for a Writ is denied, and is not an affirmance of the deter-

mination of the court below; Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U. S. 251. The decision in Blum v. Wardell by the Circuit Court of Appeals, however, now represents the law on this subject, and it is the duty of the Government, as well as a private individual, to bow to the decision of the court in that case, unless it appears that reasonable grounds exist fairly justifying relitigation of this question de novo. This question, as now presented, must be considered and decided dispassionately, to quote the language of Attorney General Cushing (6 op. A. G., 334):

"from the standpoint of a public officer, acting judicially, under all the solemn responsibilities of conscience and of legal obligation."

The question having been thoroughly litigated, the Government having had the fullest opportunity to present its view of the law and the facts, having carried the case to the court of last resort and the rule upheld by the final judgment in the case having remained undisturbed for nearly three years, the Government would, in my opinion, be justified in reopening this litigation in a new case with its consequent burden to citizens and taxpayers, only upon the basis of new facts or a new interpretation of the rules of Community Property Law in California unknown or not available to the court at the time of the original litigation, on which reasonable hope for a successful issue could be predicated. It may be conceded that questions of title to property and

the incidents thereof, questions of devise, inheritance and succession are questions primarily of State law, and that when those questions arise in a Federal court, the law of the State should be followed. must also be conceded, however, that when those questions arise in a Federal court, that court has the same right and duty to decide them as it has to decide any other questions which arise in a case. This would include the right and duty to decide what the State law is; how it relates to the issues under consideration and whether it is in conflict with any law of the United States. In passing upon questions of State law of this type it is the duty of the Federal court to refer to the statutes and decisions of the State for the purpose of ascertaining what the law of the State is and ordinarily Federal courts follow and apply the State law as defined by the judicial decisions of the State courts. Where, however, those decisions are in conflict or do not clearly define and state the rule of State law involved, it is still the duty of the Federal court to make its own determination as to what the State law is.

In determining the incidence of a Federal tax, it is entitled to form its own judgment of the legal nature and character of the subject of the tax, although this subject matter is the creation of State law. Neither State courts nor legislatures by giving that subject matter a particular name or by the use of some form of words can take away from the

Federal court the duty to consider its real nature. (See *Iowa Loan & Trust Co. v. Fairweather*, 252 Fed. 605; C. O. & G. Co. v. Harrison 235 U. S. 292.)

When, therefore, the case of Blum v. Wardell came before the Federal court, that court had power to determine what the law of California was with respect to the interest of a widow in the Community Property upon the dissolution of the community by death and having ascertained the nature and character of that interest, it was its duty to determine whether that interest was to be included in the value of the husband's gross estate for purposes of taxation; whether it was subject to payment of charges against his estate and the expenses of administration; whether it was subject to distribution as a part of his estate; whether it could be deducted from the value of the gross estate as a charge against the estate allowed by the laws of the jurisdiction and all other questions necessary to a determination of the ultimate question whether the taxes which had been paid to the Collector should be repaid to the executors of the decedent.

The decision in that case was a decision squarely upon the merits after full argument and after mature and careful deliberation and as shown by the opinion of the District Court and the opinion of the Court of Appeals, including the dissenting opinion.

The sole basis for the controversy between the Government and the taxpayer in *Blum v. Wardell* was the confusion existing in the judicial decisions

of the courts of California as to the nature of community property and particularly the interest of the surviving widow. As was indicated in the opinion of March 8, 1924, one line of judicial opinions of the courts of California has asserted that the property and ownership in community property was in the husband and that the wife took only by inheritance, and that her interest therein was a mere expectancy like that of the heir at common law. the other line of judicial opinions it has asserted, with equal vigor, that the interest of the wife in community property was a vested interest; that as survivor of the husband she takes by right of her ownership in the community property and not by inheritance, and that the legal relationship of the husband to the wife's interest was merely that of one vested with a power of disposition of that interest. It is quite clear that if either of these two diverse lines of definition of this legal relationship be literally accepted, such acceptances would be a sufficient basis for the determination of the question here under consideration. If the widow takes by virtue of her ownership in community property which is held by the community subject only to the power of disposition of the husband, obviously the estate tax has no application. If, on the other hand, she takes only as heir of her husband, then equally obviously the interest passing to the widow by inheritance, is subject to estate taxes.

In view of the extensive review of the California statutes and decisions in the opinion of March 8th, it will not be necessary to refer to this aspect of the matter further. It suffices to say that the court in Blum v. Wardell accepted the view that the interest of the wife in community property is a vested property interest for which there is ample support in one group of decisions of the California courts, and which view is fortified by the series of statutes in that State limiting the husband's power of disposition of the community property. The court in Blum v. Wardell also regarded the California statute of 1917 (Statutes 1917, page 880) as manifestly a clear legislative recognition that the wife did not take as an heir but had an interest in the nature of a vested property interest, passing over, however, the difficulty of interpreting the California statute (whose application was limited by its terms to the purpose of the Act in levying a tax upon inheritances under the State law) so as to give it efficacy in the application of the Federal Estate Tax, and ignoring a possible constitutional obstacle to declaring that the vested interest of the husband had become, by statutory flat a vested interest of the wife. But the court further supported its decision by the view of the United States Supreme Court as to the nature of the wife's interest in community property in Arnett v. Reade, 220 U.S. 311.

We therefore have a case where the Federal court made its determination of the question of State law despite a recognized conflict of authority in the State courts, supporting its determination by an interpretation of the State statute and by reference to the general principles of jurisprudence applied to the doctrine of community property as declared by the Supreme Court of the United States. I know of no basis for asking the courts now to review this determination except on the ground that there is some rule of principle of law which the courts, in deciding that ease, have overlooked or possibly upon the ground that the California courts have settled their own law by new judicial decisions contrary to the view of the California law expressed by the court in Blum v. Wardell.

There have been two decisions of the California courts dealing with this subject since the decision in Blum v. Wardell. In Roberts v. Weymeyer, 218 Pac. 22, decided by the Supreme Court of California, after the decision of the Circuit Court of Appeals in Blum v. Wardell, that court held that real estate acquired by the husband out of community funds accumulated before the adoption of Section 172 (a) of the Civil Code of California (requiring the wife's joinder in a deed to community property) became effective, the requirement of Section 172 (a) did not apply to the husband's conveyance. The court rested its conclusion upon the ground that before the adoption of Section 172 (a), the wife had no vested interest in the community property before dissolution of the community; that the husband was

the owner of community property and that the interest of the wife therein was a mere expectancy like that of an heir; that Section 172 (a) could have no application to community property acquired before its enactment, since such application of the statute would amount to a deprivation of the husband of his property interest in the community, without due process of law.

In Taylor v. Taylor, 218 Pac. 756, the court held as the California courts had held before, that upon dissolution of the community by divorce, without disposition of the community property in the decree of divorce, the wife is owner of one-half of the community property as tenant in common with the husband.

I leave it to others to reconcile the decisions in these cases. It is sufficient for the purpose of this discussion, to say that neither of them raised, stated or decided any question with respect to the wife's interest in the community property which was not fairly before and fairly presented to the court in Blum v. Wardell. Nor do they suggest any aspect of the law of California or any principle of jurisprudence applicable to the law of community property which was not fairly before the court in Blum v. Wardell, both when that case was before the Circuit Court of Appeals, and when petition for a Writ of Certiorari was submitted to the United States Supreme Court. No one therefore can fairly say that these cases add anything, by way of finality, to the

discussion which has heretofore been had. If confusion existed before so far as the California decisions are concerned, it is now the more confounded. This fact, however, does not limit in any respect the power and duty of the Federal court to determine the question of the State law involved. Nor does it give any the less finality to its decision. Where the state decisions are in conflict or not clear as to what the local state law is, the Federal court may render its own decision and thereafter hold itself bound by its own decision, disregarding later decisions of the State courts. (See Pease v. Peck, 18 How. 598; Burgess v. Seligman, 107 U. S. 20; Kuhn v. Fairmont Coal Co., 215 U. S. 349; Snare & Triest Co. v. Friedman, 169 Fed. 1.)

The confusion in the decisions of the California courts has undoubtedly arisen from the fact that the courts have been attempting, in their opinions, to apply the terminology of the common law to community property, which embodies a legal concept wholly foreign to the common law, and to which the terminology of the common law cannot be applied with accuracy and precision. In most of the California decisions in which it was asserted that the right of the wife is a mere expectancy or right of inheritance, the same result could have been reached, if the court had rested its decision upon the view that the wife had a vested interest in the community property subject to a power of disposition vested in the husband. (See Spreckels v. Spreckels; 116)

Cal. 339; Estate of Wickersham, 138 Cal. 355; Dargie v. Patterson, 176 Cal. 714.) Whereas in other cases holding that the wife's interest in the community is a vested interest, it seems to be necessary to describe the legal relationship of the husband to the wife's interest as a power of disposition in order to justify the decisions actually rendered. Estate of Brix, 181 Cal. 667; Taylor v. Taylor. 218 Pac. 757.) This, however, only suggests that a common law term may be resorted to, to describe the incidents of community property in some aspects, but be wholly inappropriate to describe them for other purposes. This was recognized by the United States Supreme Court in Arnett v. Reade, 220 U. The court, after reviewing the dis-S. 311, at 320. cussion of this subject which "has fed the flame of juridical controversy for many years" said:

"The notion that the husband is the true owner is said to represent the tendency of the French customs, 2 Brissaud, Hist. du Droit, Franc. 1699 n. l. The notion may have been helped by the subjection of the woman to marital power: 6 Laferriere, Hist, du Droit Franc, 365; Schmidt, Civil Law of Spain and Mexico, Arts. 40, 51; and in this country by confusion between the practical effect of the husband's power and its legal ground, if not by mistranslation of ambiguous words like domino. United States v. Castillero, 2 Black 1, 227. However this may be, it is very plain that the wife has a greater interest than the mere possibility of an expectant heir. For it is conceded by the court below and everywhere, we believe, that in one way or another she has a remedy for an

alienation made in fraud of her by her husband." (Italics supplied.)

It is, I think, apparent that a study of the battle over the use of the descriptive terminology applicable to community property which has been waged in the California courts for the past fifty years or more, throws only a faint and flickering light on the applicability of the Federal Estate Tax Law to the wife's interest in community property, and that a study of the true character of that interest as it existed in the Spanish Law and as it has been developed in the jurisprudence of the community property states, including California, affords no substantial basis for the hope that a renewal of the litigation on this subject in the Federal courts would change the result. Whatever view may be held of the propriety and justice of the Government's beginning anew the course of litigation already run in Blum v. Wardell, it must be admitted that reasonable hope of a successful issue is an important consideration in determining whether the Government should bow to the judicial decision which it has invoked.

While not in any sense decisive of the question I have before me, the application of the Federal Estate Tax Law in other community states and the legislative history of the matter are not without weight in determining whether the question should now be reopened. It is conceded that the interest of the surviving wife in community property in some

seven other community property states is exempt from the estate tax under laws described by the District Court as "identical" with the Statute Law of California. (See Blum v. Wardell, 270 Fed. 309, 314.) Nothing short of some controlling necessity would, I think, justify the court in upholding the tax in a single state and refusing to apply it to an interest substantially the same in the other community property states, and as we have already seen, the only justification which could be resorted to for the support of such a result is the confusion arising from the use by the California courts themselves of a terminology not altogether applicable to the interests of husband and wife in community property.

Since the Act of 1916 there have been two general revisions of the Revenue Law; the Revenue Act of November 23, 1921, (ch. 163, 42 Stat. 227) and the recent Act of June 21, 1924. While the Act of 1921 was under consideration I am informed that officials of the Treasury attempted to have a provision inserted making Community Property a part of the gross estate. The Ways and Means Committee refused to accept this proposed amendment. In the Bill which was prepared in the Treasury Department and which as amended became the Act of 1924, there was a provision requiring so-called Joint Income of husband and wife under the Community Property law of California to be returned, for purposes of taxation, as a single income of the husband.

After hearings before the Ways and Means Committee and the submission of extensive briefs in opposition to the proposal, the Committee struck from the bill the provision for taxing community income as single income and the bill, as enacted, did not set aside or modify the application of the legal rule laid down in *Blum v. Wardell*. Notwithstanding the fact that there have been two general revisions of the Revenue Act and the question involved in the decision of *Blum v. Wardell* has been distinctly presented to the legislative branch of the Government, the principle of that decision has been left undisturbed by Congress.

After a full review of the opinion of March 8, 1923, therefore, and a study of the situation presented by the California decisions including those handed down by the Supreme Court of California since the decision of Blum v. Wardell, and considering these principles which must govern the incidence of a Federal taxing statute upon a subject matter which is the creation of state law, I am unable to find those considerations which would, in my opinion, justify the Government in beginning anew in some other case, a juridical controversy which was litigated to a final conclusion in Blum v. Wardell and in which the Government's position was fully presented. Since the opinion of the Attorney General above referred to was an affirmance of the rule laid down in that case I am constrained to reestablish and reaffirm that opinion. My action in so

doing must be construed as limited to the precise question presented in that opinion as to the incidence of the Federal Estate tax upon the interest of the wife in community property on the death of the husband. I express no opinion with respect to the principles which govern the taxation of income derived from community property.

Respectfully yours,

(Signed) HARLAN F. STONE, Attorney General.

The Honorable,

The Secretary of the Treasury.

Treasury Department, Bureau of Internal Revenue.

Cumulative Bulletin No. 5. July-December, 1921. Income Tax Rulings.

Section 223, Article 401: Individual returns. Sol. Op. 121.

INCOME TAX: SECTIONS 210, 212 (a), 213 (a), and 223, REVENUE ACT OF 1918—SEPARATE RETURNS.

Where husband and wife acquire property while domiciled in the State of Idaho, and then take up domicile in California, they may continue to render separate returns of the income from such property.

The question is raised whether A and B, who acquired community property while domiciled in Idaho, may render separate returns of the income from such property after taking up domicile in

the State of California. They have no income from any source in the State of California.

Section 223 of the Revenue Act of 1918 reads in part as follows:

That every individual having a net income for the taxable year of \$1,000 or over if single, or if married and not living with husband or wife, or of \$2,000 or over if married and living with husband or wife, shall make under oath a return stating specifically the items of his gross income and the deductions and credits allowed by this title. If a husband and wife living together have an aggregate net income of \$2,000 or over, each shall make such a return unless the income of each is included in a single joint return.

Section 210 provides in part as follows:

That \* \* \* there shall be levied, collected, and paid for each taxable year upon the net income of every individual a normal tax at the following rates.

Net income is defined in section 212 (a) in the following language:

That in the case of an individual the term "net income" means the gross income as defined in section 213, less the deductions allowed by section 214.

Gross income is defined as follows (section 213):

That for the purposes of this title (except as otherwise provided in section 233), the term "gross income"—(a) Includes gains, profits, and income derived from \* \* \* dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property.

The material facts are sufficiently set forth in the first paragraph.

That B's interest in the property while the spouses are still domiciled in Idaho is sufficient to warrant their rendering separate returns of the income of that property is undisputed. (Opinion of Attorney General of February 26, 1921, T. D. 3138, published in Bulletin 11-21.) The basis for such a holding is that each has a vested right in the property and in any income that may be derived therefrom. The wife's interest in community property in Idaho is equal to that of her husband, except that he "has the management and control of the community property except the earnings of the wife for personal services and the rents and profits of her separate estate." (Article 4666, Compiled Statutes of Idaho, 1919.) In Ewald v. Hufton (Idaho, 173 Pac. 246) the court held that under the laws of the State of Idaho no distinction is made between husband and wife as to the degree, quantity, nature, or extent of the interest each has in the community property. (See also Arnett v. Reade, 220 U.S. 311; Davis v. Davis (Tex.) 186 S. W. 775.) In Kohny v. Dunbar (Idaho) 121 Pac. 544 the court said:

The statute has given to the husband no better or higher title to the community property than it has given to the wife \* \* \*. The receipts from any disposition that may be made of the property still remain community property, and the wife's interest in the receipts from any sale of community property is just as great as it was in the original community property which was sold.

The wife's interest then is vested and is acquired as soon as there is property. A vested interest is one in which there is a present fixed right, either of present enjoyment or of future enjoyment. If the change of domicile does not vary this interest, the conclusion is inevitable that the spouses should still be able to render separate returns. In *Brookman v. Durkee* (Wash., 30 Pac. 914) the court stated:

If it were the intent of the statute that property acquired in another jurisdiction and brought within the State should become community property, its legality might be seriously questioned. It would destroy vested rights. It would take from one of the spouses property over which he or she had sole and absolute dominion or ownership and vest an interest therein in the other.

To the same effect is *Depas v. Mayo* (11 Mo. 314), in which it is stated:

It must be assumed, then, that Mrs. Depas was, by the laws of Louisiana, entitled to onehalf of the estate, both real and personal, belonging to the community of which her husband was the head, and that Depas, upon his removal to St. Louis, invested a portion of this community property in the real estate \* \* \*. Now, according to the laws of this State, if A purchases land with the money of B, and takes legal title to himself, a court of equity will regard him as trustee of the wife's property. If in such a case the property is personal and the husband invests it in land, taking the title in his own name, can it be doubted that the equitable rights of the parties are not changed by the change of property and legal ownership? The

removal of Depas and his wife from Louisiana to this State does not alter the character of this transaction. Had Depas, whilst residing in Louisiana, remitted a sum of money belonging to the community and procured its investment in Missouri lands, would the rights of the parties in Louisiana have been changed? What difference can it make, that previous to the investment the parties had changed their domicile?

In the case of Successor of Popp (La., 83 So. 765) the court said:

Where the property of the wife dying in Mississippi, to which State she and her husband had removed from Louisiana, consisted of movables belonging to the community of acquests and gains, and left by the husband in his bank at Louisiana, the situs is not considered as having followed the domacile of the parties.

Because the wife has a vested interest in the property, which is not affected by change of domicile, the income from such property is income to both the husband and wife.

In view of the fact that B's vested interest in the property in question was sufficient to warrant the making of a separate return under the Revenue Act of 1918 while the spouses were still domiciled in the State of Idaho, and that the change of domicile does not affect that vested right, it is concluded that A and B after taking up domicile in California may still render separate returns of the income from such property.

CARL A. MAPES, Solicitor of Internal Revenue.

### APPENDIX XI.

Photostats of portion of Spanish, French and Mexican Law Books.

Códigos Antiguos de España, Vol. I:	Photostat Page No.
Title Page	1
Page 32	1
Page 121	3
Nueva Recopilacion (1567)	
Novisima Recopilacion (1805)	
[Pages Nos. 11-14 not used]	1-10
Libreria de Escribanos, by Josef Febre	ro
(1790) Part Second, Book One	
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# CÓDIGOS ANTIGUOS DE ESPAÑA

COLECCION COMPLETA

DE TODOS LOS CÓDIGOS DE ESPAÑA.

DESDE EL FUERO JUZGO HASTA LA NOVISIMA RECOPILACION.

CON UN GLOSARIO DE LAS PRINCIPALES VOCES
ANTICUADAS, ÍNDICES PARCIALES Y UN REPERTORIO GENERAL ALFABETICO DE MATLETAS

# D. MARCELO MARTINEZ ALCUBILLA.

ABBOARD DE LOS ILUBINES COLEGIOS DE MADRID BURGOS P SALLADOLID VALUDA DEL MEDINACIO DE LA ADVINTERNACION ESTADOLA.



MADRID.

ADMINISTRACION, ARCO DE SANTA MARIA, 41 TRIPLICADO, PRINCIPAL.

1885.



LEY XVII.—De lo que gana el marido é la muier, seyendo casados en uno.

Quantoquequier que el marido sea noble, si se casa con la muier cuemo deve, é viviendo de so uno ganan alguna cosa, ó acrecen, si alguno dellos fuere mas rico que el otro, de su buena é de todas las cosas que acreceren é ganaren en uno, tanto deve aver demas en aquello que ganáron en uno, quanto avie demas del otro en su buena: assí que si las buenas dámbos semeian eguales, por poca cosa non tomen entencion. Ca de duro puede seer que sean asmadas tan egualmientre. que non semeie que la una es meior de la otra en alguna cosa. Mas si la una es mayor de la otra connocuda mientre, quanto fuere mayor, tanto deve aver mayor partida en la ganancia, assi cuemo es dicho de suso. cada uno depues de la muerte del otro, é puédelo dexar á sus filos, ó á sus propinques, ó á etri si quisieren. E assi lo dezimos de los barones cuemo de las muieres. E de las cosas que ganáron, de que fiziéron ámos escripto, aya cada uno tal partida cuemo dixiere el escripto. E si el marido ganare alguna cosa de algun omne estranno ó en hueste, ó quel dé el rey ó su sennor, ó sus amigos, dévenlo aver sus filos ó sus herederos depues de su muerte, ó puede fazer dello lo que quisiere. E otrosi dezimos de las muieres.

## TITULO III —De les ganancias del maride y la muger.

#### LEY I.

Toda cosa que el marido é la mugar gantres, o compráren de consuno, hayanlo ambos por madigir el cargo donacion del Rey, ó de otri, é lo diase de ambos hayanlo amos marido é muger: é si lo diase de ano, hayanlo aquel á quien lo diere. (1., 5 to 17, 16, 18, 18)

LEY II.—Como lo que ganare el marido per la considencia de notra manera semejante, es sues propis.

Si el marido alguna cosa ganare de herensia de padre, ó de otro propinquo, ó donación, ó de amor, ó de pariente, ó de amigo, ó en hueste en que se por su soldada de Rey, ó de otro, hayalo todo quanto ganare por suyo: e si fuere en hueste sin soldada, á costa de si, é de su muger, quanto ganare de esta guisa sea del marido, é de la muger. Ca así como la costa es comunal, así lo que ganaren sea comunal de amos: y esto susodicho sea de las ganancias de los maridos: y esto mesmo mandamos de las mugeres. (2.º, tít. IV, lib. X, Nov. Rec.)

LEY III.—Que como galer que haya más el marido que la muger, los frutos son de cousins.

Maguer que el marido haya mas que la muger, ó la muger que el marido, quier en heredad, quier en mueble, los frutos sean comunales de ambos à dos: é la heredad, é las otras cosas donde vienen los frutos, hayalos el marido, ó la muger cuyos eran, ó sus herederos. (3.º, tít. 4.º, lib. X, N. R.)

De las ganancias entre marido y muger.

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ren patrimoniales auidos por heren- GEl marido y la muger sean obligados a re cia o donacion, o manda, mandamos que se guarde la dicha costumbre.

feruar a los bijos del primer matrimonio lo que vuieren de aquel matrimonio, ley arta tit primo deste libro.

Como han de fer metidas las herederas possession de la here abinteflato, y la pen en ella fin autorida laley de Soria, que libro quarto.

STEVA RECOFILACION (1567

repudiar berë do pero aceptar entario, ley pri-

## Titulo nono, de las ganancias entre marido y muger.

TLey primera, Que los bienes que dexare, o tunieren marido y mueer, se presumen ser comunes, saluo los quada pno dellos prouare fer suyos.

O M O quier q el dere-hus y cho diga q todas las co fas que há marido y mu ger, que todas se presume fer del marido, hasta

> que la muger muestre que son suyas, pero la costúbre guardada es en contrario, que los bienes que ha marido y muger, que son de ambos por medio, faluo los que prouare cada vno q fon fuyos apartadamente:y anfi mandamos que se guarde por ley.

Ley.ij.Como deuen partir las ganancias el marido y la muger.

Toda cosa que el marido y la mugerganaren, o compraren estado a ma ni. de cofuno, 2 yanlo ambos por medio: y fi fuere donado de rey, y lo diere a ambos, avalo marido y muger, y fi lo diere al vno, ayalo folo aquela quien lo diere.

Ley.iij.Delas cofas que deuen ser del ma rido, o de la muger: y en que han ambos parte.

SI el marido alguna cosa ganare de La tit 3. herécia de padre, o de madre, o de otro propinquo, o de donadio de feñor,o de pariente,o de amigo,o en la hueste del rey,o de otro q vaya por fu foldada, ay alo todo quanto ganare por suyo: y si fuere en hueste sin folda da,a costa de si y de su muger, quanto ganare desta guisa, todo sea del marido y dela muger:ca assi como la costa es comunal de ambos, lo q afsi ganaré fea comunal de ambos : esto q dicho es de suso delas ganácias de los maridos, y esso mismo sea de las mugeres. TLey.iiij. Que los frutos de los bienes fean

comunes de marido y muzer. MAguer, q el marido aya mas q la rulo. muger, o la muger mas q el mari-

do, quier en heredad, quier en mueble los frutos fea comunes de ambos a dos, y la hesodad, y las otras cofas do viene los frutos ayalas el marido, o la muger cuyas antes eran, o fus he rederos.

Ley.p. Declaracion de las leyes susodichas. Trofi declarado las leyes al fuero Don Enriq y lo cotenido enel libro del estilo alo de 23.

de corte, y las otras leyes q dispené peras. fobre la manera que ha de tener enlos Sf 3 bienes



# Libro quinto,

bienes ganados entre el marido y la muger durante el matrimonio, mado y ordeno, q todos y quale squier bienes castréses y officios de rey, y donadios de los q fueron ganados y me jorados, y auidos durante el matrimo nio entre el marido y muger por el vaodelios, que fea y finque de aquel que los vuo ganado, fin q el otro aya parte dellos, segu lo quiere lasdichas leves del fuero:pero q los frutos y re tas dellos y de todos otros qualefquier officios, auque sean de los q el dérecho vuo por casi castreses, y los otros bienes q fueron ganados o mejorados durate el matrimonio, y los frutos y rentas de los tales bienes ca strenses, y officios y donadios, q ambos los ayá de cosuno. Y otrosi, q los bienes q fuere ganados y mejorados y multiplicados durante el matrimonio entre el marido y la muger q no fueré castréles, ni casi castréles, q los pueda enagenar el marido durante el matrimonio fi quiliere, fin licencia, ni otorgamiento de su muger:y q el con trato de enagenamiento vala, faluo fi fuere prouado q se hizo cautelosamé te por defraudar, o damnificar a la mu ger. Y otroli mado y ordeno, que fi la muger fincare biuda, y fiedo biuda vi uiere luxuriosamete, q pierda los bie nes que vuo por razo de sumitad de los bienes que fueron ganados y mejorados por fu marido y por ella, durante el matrimonio entre ellos, y fea bueltos los tales bienes a los herede. ros de su marido defunto en cuya copañia fueron ganados.

TLey. vj. Que suelto el matrimonio entre marido y muzer, el q viuo quedare pueda disponer de la parte de los bienes mul

# Titulo, IX. 3

tiplicados q le pertenece, fin ser obligado a resermar propriedad a bijos.

M Andamos, que el marido y la mu Den la marido y la mu ger suelto el matrimonio, auque la casen segunda, o tercera vez, o mas, de 1916, pueda disponer libremète de los bie 14 nes multiplicados durâte el primero, o segudo, o tercero matrimonio, aun que aya auido hijos delos tales matrimonios, o de alguno de llos ; durante los quales matrimonios los dichos bienes se multiplicaron, como de los otros sus bienes proprios q no vuies sen sultiplicaron, como de los otros sus bienes proprios q no vuies sen sultiplicaron, como de los otros sus bienes proprios q no vuies sen sultiplicaron, como de los otros sus bienes proprios q no vuies sen sultiplicaron proprios quales matrimonios de los tales bienes.

Ley.vij. Que lo q el marido mandare a su muzer, no se entienda ser de lo que a ella le pertenece de lo multiplicado.

SI el marido mádare alguna cofa a fu lor sin muger al tiempo de fu muerte, o te flamento, no fele cuente enla parte q la muger ha de auer delos bienes mul tiplicados duráte el matrimonio, mas aya la dicha mitad de bienes, y la tal manda, en lo que de desecho deuiere valer.

Ley.viij. Como se ha de pagar la dote prometida pot marido y muger durante el matrimonio aniendo sanancias.o no.

SI el marido y la muger duráte el ma lora trimonio cafaren algú hijo comun, y ambos le prometieren la dote, o do nació propternuptias, q ambos las pa guen de los bienes que tuuieren gana dos durante el matrimonio, y fino los vuiere que bafté a la paga de la dicha dote y donació proper nuptias, que lo paguen de por medio de los otros bienes que les pertenecieren en qual quier manera, fi el padre folo durante el matrimonio, dota, o haze donació

propter

# De las donaciones y mercedes.

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propter nuptias a algun hijo comú, y del tal matrimonio vuiere bienes de ganancia, de aquello fe pague en lo q en las ganancias cupiere; y fino las vuiere, que la tal dote, o donació propter nuptias fe pague de los bienes del marido, y no de la muger.

Ley.sx. Que renunciando la muger las ganancias, no pazue deudas.

Vando la muger renúciare las ganancias, no sea obligada a pagar parte alguna de las deudas que el ma rido veiere hecho durante el matriniomo.

> Ley x. Que por el delitto del marido, o dela muzer, no pierda los bienes multiplicados, hassa la sencio a y execución della, el que no vuiere delinguido.

por el delicto q el marino, o la mu
ger cometiere, aunqfea de heregia
o de otra qualquier qualidad, no pier
da el vno por el delicto del otro fus
bienes, ni la mitad de las ganacias aui
das durante el matrimonio. Y manda-

mos q sea auidos por bienes de gana ciatodo lo multiplicado durante el matrimonio:hasta q por el til delicto los bienes de qualquier dellos sea de clarados por sentencia, aunque el delicto sea de tal qualidad que imponga la pena ipso iure.

They x oue la muger cafada por su delitto pu: da perder ganancias y bienes do-

L Amuger, durante el matrimonio, ANILLE.
por delicto pueda perder en parte
o en todo fus bienes dotales, o de
ganacia, o de otra qualquier calidad q
fean.

¶ Ea los cafos, q cafando fegunda vez la mu ger es obligada a referuar a los hijos del primer marrimonio la propricadad de lo q vuiere del primer marido, en los mifmos lo fea el marido cafando feguda vez ley quarta, titulo primero deste libro.

S Enlos edificios hechos en bienes de mayo razzo, no tienen las muzeres mital de ganancias, ley. vj. tit. vij. defle libro.

# Titulo decimo, De las donaciones y mercedes que los Reyes han hecho, y hizieren, y otras personas.

Ley primera, Que no se pueda enagenar donar señorio de villa, ni luzar, ni jurisdicton ciuil ni criminal, a ningun estran gero del reyno, por el Rey, ni otro natural del reyno, pero a natural del reyno si, y quando las palabras de los privitegios de las mercedes de la jurisdicion criminal y otras cosas en ellos contenidas estan dudosas, como se han de entender.

Ertenece a losreyes hazer gracia y mercedes a fus naturales y vaffallos, porque fean ricos y ho rados, y el estado de los reyes por ellos mas acrecentado, y por esto hizieron donaciones a los susodichos, y a yglefias, y ordenes de fu feñorio de ciudades, villas y lugares, y otras heredades, y de la julticia criminal y jurisdicion ciuil y porque se han offrecido dudas fobre la validación de las tales donaciones y mercedes, que ansi se han hecho y hazen de lo susodicho, declaramos, q si las tales cosas fueron, y fueré dadas, donadas, o ena genadas por nos,o por los reyes que despues vinieren, a otro rey, o reyno Sf 4 oaper-

Den Alefa evens en Acab. era 1984 il 17 13 deipa m dina leyts h 13 dette mulo, y la h: tie.is. hb 4.



# NOVÍSIMA PO RECOPILACION

DE LAS LEYES DE ESPAÑA,

MANDADA FORMAR

POR EL SEÑOR DON CARLOS IV.

EDICION PUBLICADA

POR DON VICENTE SALVÁ,

EN LA QUE VAN AGREGADAS AL PIN

LAS ORDENANZAS DE BILBAO,

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TOMO QUARTO.

LIBROS IX, X, XI Y XII.



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PARIS,
LIBRERÍA DE DON VICENTE SALVÁ.

1846.



#### TITULO IV.

#### DE LOS BIENES GANANCIALES, O ADQUIRIDOS EN EL MATRIMONIO.

#### LEV L

Lev 1, 1st. 3, lib. 3, del Fuero Real.

Modo de partir entre marido y muger los bienes adquirid is en el matrimonio.

Toda cosa que el marido y muger ganaren ó compraren, estando de consuno, háyanlo ambes por medio; y si fuere donadio de Rey ó de otri, y lo diese á ambos, háyanlo marido y muger; y si lo diere al uno, háyalo solo aquel a quien lo diere. Jeg 2. tit, 9. leb. 5. R.)

#### LEY II.

#### Lev 2 tit 3 lib 3 del Fuero Real.

Rienes comunes a marido y mager, y los pertenecientes a cada uno por si

Si el marido alguna cosa ganare de herencia de padre o de madre, o de otro propinquo, o de donado de señor, o de pariente ó de amigo, ó en la hueste del Rey, ó de otro que vaya por su soldada, hayalo todo quanto ganare por suyo ; y si fuere en hueste sin soldada, á costa de si y de su muger, quanto ganare desta guiso, todo sea del marido y de la muger, ca así como la costa es comunal de ambos, lo que así ganaren sea comunal de ambos ; esto que dicio es de suso de las ganancias de los maridos, cos mísmo sea de las mugeres. (leg 3. tat. 9, tot. 5. R.)

#### LEV III

#### Les 3 tit 3 hb 3 del Fuero Real.

Les feutes de les bienes propies del marido e de la mager sean comunes.

Maguer que el marido haya mas que la muger, ó la muger mas que el marido, quier en heredad quier en mueble, los frutos sean comunes de ambos á dos; y la heredad, y las otras cosas do vienen los frutos, háyalas el marido ó la muger cuyas ántes eran, ó sus herederos,  $(ley\ 4,\ tit.\ 9,\ tib.\ 5,\ R_*)$ 

#### LEY IV.

Ley 203, del Estito; y D. Felipe II, año de 1566

Los bienes que tengan el marido y uniger se presaman comunes, no probando su respectivo pertenencia.

Como quier que el berecho diga, que todas las cosas que han marido y muger, que todas se presumen ser del marido, hasta que la muger muestre que son suyas ; pero la costumbre guardada es en contrario, que los bienes que han marido y muger, que son de ambos por medio, salvo los que probare cada uno que son suyos apartadamente; y ansi mandamos, que se guardo por ley. (ley 1. tit. 9. tib. 5. R.)

#### LEY V.

D. Euroque IV. en Nieva año de 1473 pet, 25.

Bienes comunes, y los pertenecientes a mavida o muyer, en declaración de las precedentes leges del Facro y Estilo.

Declarando las leyes del Fuero, y lo contenido en el Libro del Estilo de Corte, y las otras leyes que disponen sobre la manera que se ha de tener en los bienes ganados entre el marido y la muger durante el matrimonio, mando y ordeno, que todos y qualesquier bienes castreness, y oficios del Rey, y donadios de los que fueron ganados, y mejorados y habides durante el matrimonio entre el marido y muger por el uno dellos, que sean y finquen de aquel que los hubo ganado, sin que el otro haya parte dellos, segun lo quieren las dichas leyes del Fuero; pero que los frutos y rentas dellos, y de todos otros qualesquier oficios, aun-

que sean de los que el Derecho hubo por casi castrenses, y los otros bienes que fueron ganados ó mejorados durante el matrimonio, y los frutos y rentas de los tales bienes castrenses y oficios y donadios, que ambos los hayan de consuno. Y otrosí, que los bienes que fueren ganados, mejorados y multiplicados durante el matrimonio entre el marido y la muger, que no fueren castrenses ni casi castrenses, que los pueda enagenar el marido durante el matrimonio, si quisiere, sin licencia ni otorgamiento de su muger, y que el contrato de enagenamiento vala, salvo si fuere probado que se hizo cautelosamente por defraudar ó damnificar á la muger. Y otrosi mando y ordeno, que si la muger fincare viuda, y siendo viuda, viviere luxuriosamente, que pierda los bienes que hubo por razon de su mitad de los bienes que fueron ganados y mejorados por su marido y por ella, durante el matrimonio entre ellos, y sean vueltos los tales bienes à los herederos de su marido difunto en cuya compañía fucron ganados, (ley 5, tit. 9, tib. 5, Il.)

#### LEY VI.

#### Ley 14 de Toro.

Facultad del conyuge que superviva, para disponer de los bienes multiplicados en el matrimonio, sin obligacion à reservarlos para los hijos de el.

Mandamos, que el marido y la muger, suelto el matrimonio, aunque casen segunda ó tercera vez ó mas, puedan disponer libremente de los bienes multiplicados durante el primero, ó segundo ó tercero matrimonio, aunque hava habido hijos de los tales matrimonios, ó de alguno dellos, durante los quales matrimonios los dichos bienes se multiplicaron, como de los otros sus bienes propios que no hubiesen sido de ganancia, sin ser obligados á reservar á los tales hijos propiedad ni usufruto de los tales bienes. (ley 6. tit. 9. lib. 5. R.)

#### LEY VII.

Ley 15 de Toro.

Casos en que los padres que pasan à segundo matrimonio, deben reservar a los hijos del primero la propiedad de los bienes del di-

En todos los casos que las mugeres, casando TOMO IV

segunda vez, son obligadas á reservar á los hijos del primer matrimonio la propiedad de lo que hubieren del primer marido, ó heredaren de los hijos del primer matrimonio, en los mismos casos el varon que casare segunda ó tercera vez, sea obligado á reservar la propiedad de ello á los hijos del primer matrimonio; de manera que lo establecido cerca deste caso en las mugeres que casaren segunda vez, hava lugar en los varones que pasaren á segundo ó tercero matrimonio. (ley 4, tit. 1, lib. 5, R.)

#### LEV VIII.

Ley 16 de Toro.

Los bienes mandados por el marido à la muger, no se comprehendan en la mitad que ha de haber en los gananciales.

Si el marido mandare alguna cosa á su muger al tiempo de su muerte ó testamento, no se le cuente en la parte que la muger ha de haber de los bienes multiplicados durante el matrimonio, mas hava la dicha mitad de bienes, y la tal manda en lo que de Derecho debiere valer. (leg 7. tit. 9. lib. 5. R.)

#### LEV IX.

Ley 60 de Toro.

La muger, renunciando las ganancias, no paque las deudas hechas por el marido durante el matrimonio.

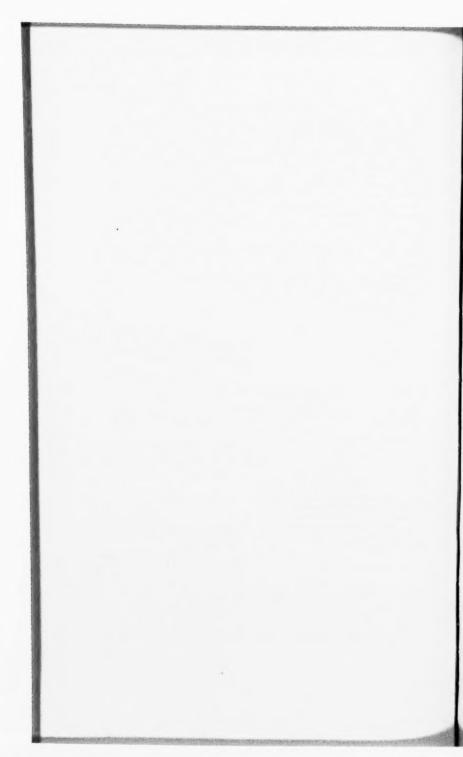
Quando la muger renunciare las ganancias, no sea obligada á pagar parte alguna de las deudas que el marido hubiere becho durante el matrimonio. (leg 9. tit. 9, lib. 5, R.)

#### LEY X.

Ley 77 de Toro.

Ninguno de los conyuges, por delito del otro, pierda los bienes multiplicados hasta la sentencia declaratoria.

Por el delito que el marido ó la muger cometiere, aunque sea de heregia, ó de otra qualquier qualidad, no pierda el uno por el delito del otro sus bienes, ni la mitad de las ganancias habidas durante el matrimonio : y mandamos, que sean habidos por bienes de ganancia todo lo multiplicado durante el matrimonio, hasta que por el tal delito los bienes de qualquier dellos sean declarados por sentencia.





aunque el delito sea de tal calidad que imponga la pena 1300 jure. (ley 10. tit. 9. lib. 5. R.)

#### LEY XI.

#### Ley 78 de Toro.

La muger ensada pueda perder por delito los gananciales, y demas bienes que la pertenezon.

La muger, durante el matrimonio, por delito pueda perder en parte ó en todo sus bienes dotales ó de ganancia, ó de otra qualquier qualidad que sean. (ley 11. td. 9. td. 5. R.)

#### LEY XII.

D. Carlos III. por resol. á cons. de 15 de Sept., y ced. del Consejo de 20 de Dic. de 1778.

Observancia del fuero del Baylo, en quanto a sujetar à partición, como gananciales, los bienes llevados ó adquiridos en el matrimonio.

Apruebo la observancia del fuero denominado del Baylio, concedido à la villa de Alburquerque por Alfonso Tellez, su fundador, yerno de Sancho II., Rey de Portugal, conforme al qual todos los bienes que los casados llevan al matrimonio, ó adquieren por qualquiera razon, se comunican y sujetan à particion como gananciales: y mando, que todos los Tribunales de estos mis Reynos se arreglen à el para la decision de los pleytos que sobre particiones ocurran en la citada villa de Alburquerque, ciudad de Xerez de los Caballeros, y demas pueblos donde se ha observado hasta abora; entendiendose sin perjuicio de providenciar en adelante otra cosa, si la necesidad ó transcurso del tiempo acreditase ser mas conveniente que lo que hoy se observa en razon del citado fuero, si lo representasen los pueblos.

#### LEY XIII.

D. Cárlos IV. por resol. 4 cons. de 17 de Abril, y provis, de 16 de Junio de 1801 para Córdoba, y circ. del Consejo de 6 de Marzo de 803.

Derogación de la ley ó costumbre, prohibitira de que los mugeres Cordobesos participen de los gananciales adquiridos durante el matrimonio.

Abolimos en quanto sea necesario la supuesta ley, costumbre ó estilo que ha gobernado hasta ahora en la ciudad de Córdoba, de que las mugeres casadas no tengan parte en los bienes gananciales adquiridos durante el matrimonio. En su consequencia queremos y mandamos, que la ley general de la participacion de las ganancias en los matrimonios sea extensiva á las mugeres Cordobesas de todo aquel Reyno, segun y como se practica con las de Castilla y Leon. Y en esta conformidad mandamos al Corregidor de la expresada ciudad de Córdoba, á los Alcaldes mayores de ella, y demas á quienes corresponda, observen, guarden y cumplan la citada resolucion de nuestra Real persona, haciéndola observer. guardar y cumplir en todo y por todo, segun y como en ella se contiene : y á fin de que esta Real resolucion tenga puntual observancia en todo el Reyno, se comunique á las Chancillerías, Audiencias. Corregidores y Justicias de

(1) Por Real resolucion à cont. del Consejo de 17 de Diciembre de 1803, comunicada por circular de 14 de Abril de 804, con motivo de representacion hecha, manifestando las dudas y plevtos que pofran sassituses subre la inteligencia de lo dispuesto en esta Real provision, temendo S. M. presente no ser derogatoria de algual de finale de la constituire racional anterior, sino declaratoria de un derecho de que solo kan estado privados. las mugeres Cordobesas por una suporeta costumbre, o mas bien pernicio o abuso; se strato declazar, que comperhende, no solo los matrimonias contrados despusde 28 de Mayo de 801, en que se publicó la Real determinación en el fone-jo, sino tambien tudos los celebrados antes de aquel día, y que subsistian en el; pero con exclusión de los que se hube-sen disuelto antes de aquella epoca.

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DIVIDIDA EN TRES LIBROS.

TRATA DE LOS CINCO JUICIOS de inventario, y particion de bienes de difunto, ordinario, executivo, y de concurso, y prelacion de acreedores.

OERA UTILISIMA PARA TODA CLASE DE PERSONAS.

Corregida, mejorada, y adiccionada por

## SU AUTOR

DON JOSEF FEBRERO, NATURAL de la Ciudad de Mondoñedo, Escribano Real, y del Colegio de esta Corte, y Agente de Negocios de los Reales Consejos.

#### LIBRO PRIMERO.

y de el de particion entre la viuda, y herederos de su marido hasta reintegrarla de todos sus derechos.

CON LAS LICENCIAS NECESARIAS.

MADRID: EN LA OFICINA DE LA VIUDA DE MARIN, AÑO DE 1790.

muera, no se extingue, antes bien siempre queda en la muger vivo, ileso, y sin el mas leve gravamen, ni diminucion, al modo que la propiedad de la finca vinculada, y no se hace de peor condicion que estaba antes de casarse. ni queda indotada, para bolverse à casar: por eso le tocan, y los hace suyos. Y solo en el caso, y terminos propuestos en el cap. 2. de mi primera parte Tom. 1. num. 18. de que trataré en el tercero de este lib. num. 20. estará obligado à restituir los que que justamente se pacten, porque es visto haberlos renunciado à su favor, y querido privarse de ellos (bien que neciamente, y asi echese asimismo la culpa) lo qual no le está prohibido, (1) pues à quanto se obliga el hombre, à tanto queda obligado. (2) Y lo mismo digo quando la muger lleva en dote algun empleo que el marido debe servir, y por muerte de éste puede exercer otro con quien se case, como en dicho cap. 2. expliqué. Acerca de lo qual vease à Morquecho de divis. bonor. lib. 2. cap. 11. ex num. 19. al 37. y à los que cita, y à Bersano de viduis cap. 2. quæst. 45. que se hace cargo de las opiniones, y distingue de casos, segun sea la constitucion de la dote. Advirtiendo que quando se da à la muger un predio en dote para sustentar con sus frutos las cargas matrimoniales :. ò se la promete para este efecto cierta cantidad annua, no debe colacionar los frutos, ni ésta, porque son alimentos, los quales no son conferibles como el predio, (3) à menos que se pacte lo contrario al tiempo de su dacion, ò promesa.

29 A la muger casada se comunica, y transfiere en habito, y potencia el dominio, y posesion revocable, y ficta de la mitad de los bienes, que constante matrimonio lucra, y adquiere con su marido: y despues que éste fallece, se le transfiere irrevocable, y efectivamente, de suerte que por su fallecimiento se constituye dueña absoluta en posesion, y propiedad de la mitad que dexe, (4) al modo

<sup>(1)</sup> Ley Si quis in conscriben do 29. Cod. de Pact.

<sup>(2)</sup> Ley 2 rit. 16. lib. 5. Recop. (3) Gam. Decis. 140. n. 3 Gatier. do Tutel. part. 3. cap. 35. n. 7.

<sup>(4)</sup> Rodrig. Suar. en la ley r. tit. 3. lib. 3 del Fuero Real, vers. Ulterius quero. Gom. en la 50. de Toro n. 76. en la 60. n. r. y en la 77. n. 2. y lib. 2. Var. cap. 5. num. 3 Sr. Gre-

que en los socios convencionales lo dispone la ley 47. al fin, tit. 28. Partid. 3. ibi : Otrost decimos, que toda ganancia que qualquier dellos faga, que el Señorto de ella pasa à los otros

tambien, como si cada uno dellos la oviese fecba,

Pero el marido no necesita la disolucion del matrimonio para constituirse real, y verdadero dueño de todos. pues constante éste, tiene en el efecto su dominio irrevocable: y asi los puede administrar, trocar, y no siendo castrenses, ni quasi castrenses, vender, y enagenar à su arbitrio, cesante el doloso animo de defraudar à su muger, como se prueba de la ley 5. tit. 9. lib. 5. Recop. que dice: Y otrost, que los bienes que fueren ganados, y mejorados, y multiplicados durante el matrimonio entre el marido, y la muger, que no fueren castrenses, ni casi castrenses, que los pueda enagenar el marido, durante el matrimonio, si quisiere, sin licencia, ni otorgamiento de su muger: y que el contrato de enagenamiento vala, salvo si fuere probado que se bizo cautelosamente por defraudar, d damnificar à la muger. Por lo que mientras el marido vive, y no se disuelve su matrimonio, ò no hay divorcio, no debe decir la muger que tiene gananciales, ni impedirle el uso licito de los que adquiera, à pretexto de que la ley la concede su mitad, porque esta concesion se entiende para los casos expresados, y no en otro, como algunas necias creen.

En consecuencia de lo expuesto se duda ¿si la muger disuelto el matrimonio, podrá repetir, y cobrar de los deudores, y terceros poseedores sin cesion del marido, ò de sus herederos la mitad de los gananciales, y débitos que la toca? Y algunos (1) dicen que si la muger está contenida con el marido en el instrumento, ò contrato, puede; mas no, sino lo está, porque en la sociedad universal, ò de todos los bienes no se transfieren los derechos sin la

cesion, segun el Comun. (2)

Pe-

Greg. Lop en la 55. tit. 5. Partid. 5. glos. 2. vers. Et facit hoc. Sr. Covar. lib. 3. Variar. cap. 19. Ayor. de Partition. part. 2. quast. 41. Morquech. lib 2. cap. 14. n. 1. y 2.

(1) Abendan. respons. 20. n. 3. y

Tom. I.

otros que cita. Gutier lib. 2. Pract. quest 118. n. 15 y 16. Dieg Perez en la ley 4 tit. 8. lib. 3 Ordenam. col. 108 c.

(2) Ley 3. ff. Pro socio.

# DE ESCRIBANOS, ABOGADOS Y JUECES, QUE COMPUSO

# DON JOSEF FEBRERO,

ESCRIBANO REAL Y DEL COLEGIO DE LA CORTE,

T HA REPORMADO DE NUEVO EN SU LENGUAGE, ESTILO, METODO Y MUCHAS DE SUS DOCTRINAS, ILUSTRANDOLA Y ENRIQUECIENDOLA SEGUNDA VEZ CON MUCHAS NOTAS Y ADICIONES, PARA QUE SE HAN TENIDO PRESENTES LAS REALES ÓRDENES MAS MODERNAS.

## EL LIC. D. JOSEF MÁRCOS GUTIERREZ:

Obra no solo necesaria á los Escribanos, Abogados y Jueces, sino tambien utilisima á los Procuradores, Agentes de negocios y á toda clase de personas.

## PARTE SEGUNDA.

De inventarios, tasaciones y particiones de bienes, de lot juicios ordinario, egecutivo, y de concurso de acreedores, de las materias de competencias, avocaciones, v.c. y de las instancias de apelacion, suplicacion, segunda suplicacion é injusticia notoria con sus correspondientes formularios: á todo lo cual ha añadido el Reformador una Práctica Criminal de España para complemento de la obra principal, en que nunca se ha tratado de materia tan necesaria é importante.

## TOMO III.

## QUINTA EDICION.

A costa de la heredera del Reformador Doña Josefa Gutierrez.

CON PRIVILEGIO.

MADRID: EN LA IMPRENTA DE D. FERMIN VILLALPANDO,

Año de 1819.

Bete tomo y los a vest inter de esta obra y los 3 de la Practica Criminal te ballarán en la librerta de Castillo, frente las gradas de S. Felipe el Real.

de casarse: ni queda indotada para volverse á casar. Solamente en el caso y en los términos propuestos en la primera parte (a) estará obligado á restituir los que justamente se pacten, porque es visto haberlos renunciado á favor de la muger, y querido privarse de ellos, lo cual no le está prohibido. Lo mismo digo cuando la muger lleva en dote algun empleo que el marido debe servir, y por muerte de éste puede egercer otro con quien se case, como expresé en el n. cit. Y cuando se da á la muger un prédio en dote para sustentar con sus frutos las cargas matrimoniales, ó se le promete para este efecto cierta cantidad anual, no debe colacionar los frutos, ni ésta, porque son alimentos, los cuales no son colacionables como el prédio (b), á menos que se pacte lo contrario al tiempo de su donacion ó promesa.

a6 A la muger casada se comunica constante el matrimonio el dominio y posesion, aunque revocable, de la mitad de los gananciales, y por fallecimiento de su marido se hace dueña absoluta en posesion y propiedad de ella; pero el marido aun durante el matrimonio tiene un dominio irrevocable en todos los gananciales, y asi los puede administrar, trocar, y no siendo castrenses ni cuasi castrenses, vender y enagenar á su arbitrio, no procediendo con ánimo de defraudar á su muger, segun lo dice expresamente una ley recopilada (c). Asi pues, mientras el marido vive, y no se disuelve su matrimonio, ó no hay divorcio, no debe decir la muger que tiene gananciales ni impedirle el uso lícito de los que adquiera con pretexto de que la ley le concede su mitad, porque esta concesion se entiende para los casos expresados y no otros (\*).

(a) Cap. 21 n. 12 que puede verse. (b) Gutier. de Tutel. part. 3 c. 35 n. 7.

(c) La 5 t. 9 lib. 5, que dice: »I otrosi que los bienes que fueren ganados, i mejorados, i multiplicados durante el matrimonio entre el marido i la muger, que no fueren castrenses, ni casi castrenses, que los pueda enagenar el marido, si quisiere, sin licencia ni otorgamiento de su muger; i que el contrato de enagenamiento vala, salvo si fuere probado que se hizo cautelosamente por defraudar, ó damnificar à la muger.» Es la ley 5 t. 4 lib. 10 N. R.

(\*) La distincion que aqui se hace entre el dominio de la muger y el del marido en los gananciales, llamando al uno revocable y al otro irrevocable, es confusa, y aun falsa, pues tan irrevocable es el del uno como el del otro consorte. En virtud de la ley los gananciales pertenecen igualmente y pro indiviso al marido y á la muger; pero aquel tiene ademas su administracion, de que esta carece hasta que por fallecimiento del marido se te entreguen los que le toquen, y que podrá administrar por sí misma. Tambien es una misma la posesion del marido y de la muger en los gananciales, aunque el primero tenga su manejo. Asi

27 En consecuencia de lo expuesto se duda, si la muger disuelto el matrimonio podrá repetir y cobrar de los deudores y terceros poseedores sin cesacion del marido ó de sus herederos la mitad de los gananciales y créditos que le toca. Algunos AA. (a) dicen que si se hace mencion de la muger juntamente con el marido en el instrumento o contrato, puede hacerlo; mas no de lo contrario, porque en la sociedad universal, ó de todos los bienes no se transfieren los derechos sin la cesion. Pero otros (b), con cuyo parecer me conformo, dicen que no es necesaria la cesionhágase ó no mencion de la muger en el instrumento, y sean los bienes muebles, raices, derechos, deudas y acciones: lo primero, porque si se hace dueña absoluta de la parte que le corresponde luego que muere su marido, es superfluo que pida lo que tiene y el derecho le concede; pues por su mitad le competen todos los interdictos ó remedios posesorios: lo segundo, porque cuando da ley divide algo entre varios, no es necesaria la mútua concesion de unos á otros, y asi el uno sin la del otro puede pedir su parte : lo tercero, porque al modo que el sócio puede denunciar por su parte la obra nueva, si lo hace á nombre de los consócios, dando la competente caucion (c), podrá exigir tambien los débitos sin cesion: lo cuarto, porque la sociedad convencional se diferencia en muchas cosas de la conyugal, como diré en el S. 4 de este capítulo; y lo quinto, porque segun una ley de Partida (d) lo que un socio adquiere en la compania universal, se comunica á los demas sin cesion, y siéndolo, como lo es, la convugal en cuanto al lucro, se debe comunicar tambien sin ella.

28 No solo en el matrimonio legítimo y verdadero se comunican á los casados los bienes que con su industria y trabajo adquieren mientras dura, sino tambien los que ganan durante el putativo, y que ellos tienen por legítimo, no de otra suerte (e); y le propio milita en la dote, pues goza de iguales privilegios en éste que en aquel, si se padece la misma ignorancia (f). Asimis-

debe hablarse de los gananciales en este punto para evitar toda oscuridad y falta de exactitud.

<sup>(</sup>a) Avendañ, respons, 20 n. 3 Gutlett, lib. 2 Pract, quest. 118 nn. 15 y 16.
(b) Acev. ley 2 t. 9 lib. 5 R. nn. 19, 20 y 21. (c) Ley 2 t. 32 P. 3 y su glos 5 (d) Ley 47 al fin. t. 27 P. 3. (e) Cap. 2 de Donation. inter vir. & uxor. Gam. ley 50 de Toro n. 69 vers. Quod extende, y n. 77. (f) Covar. de Sponsal, part. 2 §. 1 cap. 7 nn. 3 y 8.



# **FEBRERO**

# NOVÍSIMAMENTE REDACTADO,

CON

LAS VARIACIONES Y MEJORAS

ESPRESADAS EN EL PROSPECTO, QUE SIRVE

DE PRÓLOGO Á LA OBRA.

POR

## D. EUGENIO DE TAPIA,

Individuo del Consejo de Instruccion pública, y Bibliolecario mayor de la nacional de esta corte.

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TOMO 3.

MADRID, 1845.

LIBRERIA DE LOS SRES. VIUDA DE CALLEJA E HIJO, EDITORES.

nado, ó al contrario, cesa todo motivo de duda, y así debe llevarlo aquel á quien fue la voluntad del do-

nante que pasase.

- Durante el matrimonio la muger solo tiene en hábito el dominio y la posesion revocable de los bienes gananciales, y hasta que muere el marido no se constituye duena absoluta en propiedad y posesion de la mitad que la corresponde; por consiguiente viviendo aquel no puede disponer de cantidad alguna por pequeña que sea, en concepto de ganancial, sin licencia de su marido. Por el contrario este durante el matrimonio es verdadero dueño de los gananciales (1); y asi los puede trocar, vender y enagenar á su arbitrio, no mediando fraude ó ánimo doloso de defraudar á la muger (2). Los autores dudan si podrá tambien donarlos, y Febrero es de opinion que la donacion será válida siempre que sea hecha á sus parientes, ó tan moderada que no cause grave perjuicio á la muger: la razon en que se funda es, que mayor trabajo tiene el marido en adquirirlos, que ella en conservarios.
- 13. No solo en el matrimonio legítimo y verdadero se comunican á los casados los bienes gananciales, sino tambien en el reputado ó tenido por lejítimo, aunque luego resultase no serlo; porque se procedió de buena fé.
- 14. Siempre que por culpa conocida del marido tengan notable desfalco los bienes de la sociedad conyugal, ó se graven con censo, fianza ó de otra forma, debe pagarlo el marido de su haber privativo; ya porque el daño que un socio causa por su culpa al otro

<sup>(1)</sup> Así dice Febrero y otros varios autores; mas en nuestro concepto el marido y la muger tienen la posesion y dominio sobre los bienes gananciales, como dos condueños; si bien el marido es el que los administra por ser el gefe de la sociedad conyugal.

<sup>(2)</sup> L. 5 tit. 4 lib. 10 N. R.

# SOMESIVON ALAS

## Ó NUEVA ILUSTRACION

DEC

## DERECHO REAL DE ESPAÑA.

Reducida á mejor método, corregida en muchas de sus partes, considerablemente aumentada y adicionada con un tratado nuevo de adicion y particion de herencia, y con los decretos publicados desde la Novísima Recopilacion hasta el dia, á que se han arreglado todos los tratados.

POR

# D. Ioaquin Romero y Ginzo,

Abogado de los Tribunales Nacionales y Sócio honorario de la Academia Literaria de la ciudad de Santiago.

DEDICADA

# al Sr. D. Ramon de la Sagra,

Miembro del Instituto Real de Francia y de varias Academias Nacionales y Estrangeras.

SECUNDA EDICION.

Aumentada con la parte de Derecho Penal y de Procedimientos de que se hallaba falta la primera.

Por un Profesor de Burisprudencia.

TOMO PRIMERO.

#### MADRID:

Librería de García, calle de la Concepcion Gerónima.





De los gananciales y otros efectos civiles del matrimonio.

Titulo 4.º, lib 10, Nov. Rec.

S. I.

### De los gananciales.

Núm 1. Qué cosa sean. Puede sin duda ponerse como el afecto civil mas famoso del matrimonio en España, efecto desconocido en las leyes romanas, la adquisicion para ambos cónyuges por mitad de lo que ganaren cada uno de ellos por titulo oneroso durante matrimonio, que puede llamarse derecho de gananciales. Apenas puede darse una definicion exacta de lo que estos sean, por las varias clases de bienes, que comprenden. No sería con todo un despropósito decir que son gananciales « aquella parte de los bienes ganabo dos durante la sociedad matrimonial, que por las leyes pervetenece de por mitad á los dos cónyuges.»

Núm. 2. Cuando se empieza esta sosiedad. Comienza solo con el matrimonio considerado como sociedad legal. Antes de querer resolver cuestiones, está en el orden fijar las oportunas bases. Naciendo la comunion de bienes entre los cónyuges, del matrimonio, y durando mientras subsista este por beneficio de la ley, leges del tit. 4, lib. 10, debe decirse que el matrimonio incluye una sociedad legal entre ellos, algo diferente de las demas sociedades regulares; como veremos por los efectos de aquella, cotejados con los que en su lugar se dirá producen estas. Téngase pues por regla, dedu-



## EL LITIGANTE

INSTRUME.



# O EL DERECHO

PT E-TO

AL ALCANCE DE TODOS.

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GUAR DEL DOSTOR D. JUAN SALS,

que se enseña

EN LAS UNIVERSIDADES DE ESPAÑA.



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MEJICO, LIBRERIA DE J. ROSA.

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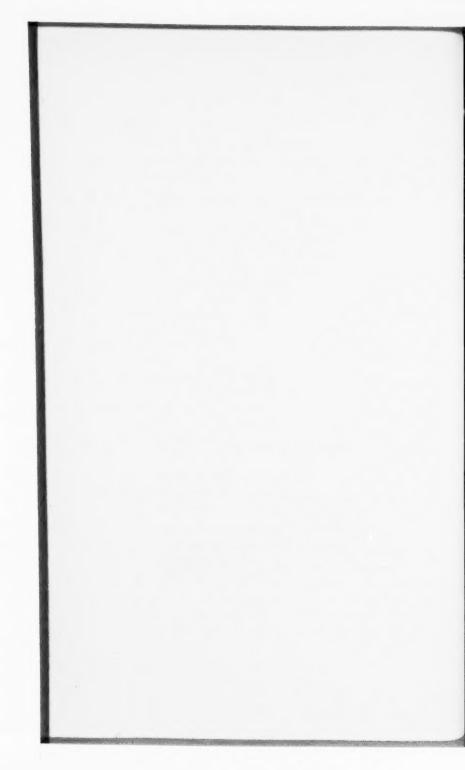
- P. Cuales mas?
- R. Los frutos y rentas de los bienes de cualquiera de los dos, ya sean de herencia, legado ú oficio, quedando la propiedad del que la tenga. L. 3 y 5 de d. tit. 1.
- P. Se entienden gananciales los frutos percibidos o también los pendientes?
- R. En los arboles y viñas los fratos pendientes es menester que aparezean ó esten a la vista; pero en los sembrados entran hasta los gastos hechos en barbechos para sembrar. (L. 10, ltt. 1, ltb. 3 del Fuero Real.)
- P. Y las mejoras de los bienes de cualquiera de los cónyuges?
- R. Se entienden gananciales, si provienen de su industria y trabajo; mas no si provienen de la naturaleza, como el aluvion, cuya doctrina admiten Covarrubias, Gomez y Matienzo.
- P. Y el aumento que tuvo la moneda de oro en el año de 1779?
- R. Fue solamente del dueño de la moneda. (L. 18, tit 17, lib. 9 de la Nov. Recop.)
- P. Y si se comprase en el matrimonio alguna cesa con dinero de uno de los conxuges?
- R. Será de ámbos lo que se comprase; pero en el cumulo de gananciales, sacará lo que hubiese costado a quel de quien fuese el dinero. L. 2, tit. 1, lib. 3 del Fuero Real.)
- P. A quien pertenece el dominio de los bienes a lquiridos durante el matrimonio?
  - R. Es comm por mitad del marido y la muyer.





sin atenerse a que hava llevado al matrimonio mas caudal el uno que el otro. (L. 1, 3 y 1, de d. tit. 4, lib. 10 Nov. Recop.)

- P. Y quien ejerce este dominio durante el matrimonio?
- R. El marido, por cuya razon puede enagenar estos bienes sin el consentimiento de la muger, à no ser que se pruebe haberlo hecho con ánimo de defraudarla ó perjudicarla. (L. 5, de d. tít. 4.)
- P. Puede el marido disponer en su testamento de la mitad de los gananciales de su muger?
- R. No, señor : son de ella en propiedad y usufructo : puede disponer de ellos, como de los demas bienes libres, sin obligacion de reservar nada para sus hijos. (L. 6 de d. tit. 1.)
  - P. Y si el marido legare algo à la muger?
- R. Tendrá esta el legado sin diminucion de la mitad de sus gananciales. (L. 8, de d. tit. 4.)
- P. Puede la muger renunciar el derecho que tuviere à la mitad de sus gananciales ?
- R. Si, señor; y si lo hiciere, no estará obligada á pagar las deudas hechas por el marido durante el matrimonio. (L. 9 de d. tit. 4.)
- P. Debiendo en toda sociedad sacarse las cargas para liquidar las ganancias, ¿pueden sacarse las dotes y las donaciones propter nuptios à los hijos en la sociedad del matrimonio?
- R. No, señor, por ser una carga del matrimonio : por el contrario, si los gananciales no alcanzaran á pagar las dotes y donaciones, las habrán de pagar de los otros bienes los des conyuges, si las prometieron



# SALA MEXICANO,

Ó SEA:

# LA ILUSTRACION AL DERECEO REAL DE ESPANA,

que escribio el

Boctor Bon Buan Bala.

ILUSTRADA CON NOTICIAS OPORTUNAS DEL DERECHO ROMANO, Y LAS LEVES Y PRINCIPIOS QUE ACTUALMENTE RIGEN EN LA REPUBLICA MEXICANA.

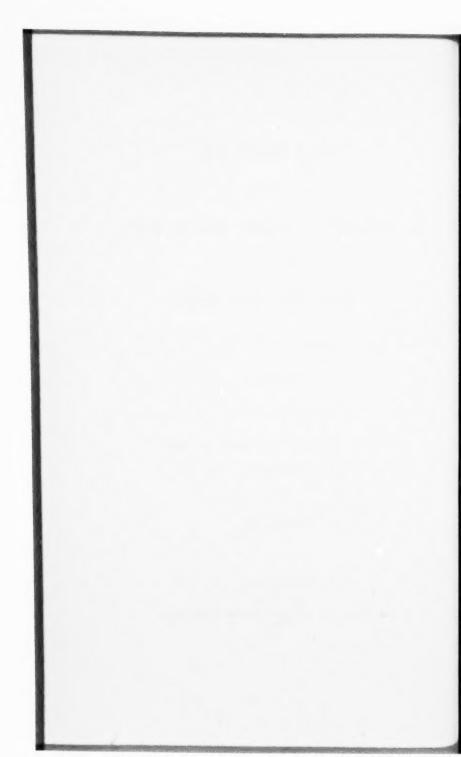
## OBRA ESPECIALMENTE DEDICADA

The la recomendable juventud que sigue

TOMO. III.

MEZICO.

Se espende en la Librería del Portal de Mercaderes Núm. 7.



vueltas es divisible. En el retracto, el precio, aunque el abolengo quede solo del retrayente (1).

27. Son cargas de la sociedad: 1. • las deudas contraidas por el marido durante el matrimonio: 2. • las dotes de las hijas y donaciones hechas propter nuptias á los hijos, sea que ambos las hayan prometido, ó solo el marido, con tal que quepan en los gananciales de uno y otro; pero si hubiere esceso y el marido solo fué el que la prometió, de sus bienes y no de los de la muger, se completará (2). El marido no puede ejercer acto ninguno disuelta la sociedad: y aunque el dar á sus hijos, para subsistir en el matrimonio, sea cargo de uno y otro, el asignar la cantidad de la dote ó prometerla por especial obligacion, siendo un acto administrativo, no puede obligar á los bienes de la muger despues que el matrimonio ha sido disuelto (3).

28. El dominio radical de los bienes de la sociedad, ecsiste en ambos cónyuges, y no en cada uno de ellos (4); pero en ejercicio está en el marido quien puede disponer de dichos bienes aun contra la voluntad de la muger, á no ser que lo haga con ánimo de perjudicarla (5): y de aquí coligen los intérpretes (6), que con tal que no haya dolo, valdrá aun la enagenacion que perjudique á la muger como si el marido fuere jugador ó vicioso. Unos (7) dicen que puede donar; otros (8) que no; otros (9) que puede hacer donaciones moderadas y con causa. Pero esta facultad no puede pasar mas ailá del matrimonio, por lo que no podrá hacer donaciones por causa de muerte; y si alguna hicière,

<sup>(1)</sup> Moi, e.t. Gom. à la 70 de Toro.

<sup>(2)</sup> L. S. tit. cit. R., 4, tit. c. N.

<sup>( )</sup> Gom, a la 53 de T.

<sup>(</sup>i) Ls. 1 y 2, (i). 9, life 5 R., 1 y 4, (i). 4, lib. 10 N.

<sup>(4)</sup> L. 5, rec. e t.

<sup>(6)</sup> Gara de comu con can 66. Ayora epina lo centrarac

<sup>(</sup>i) Gate y ofres.

<sup>(5)</sup> Mat. y los que este inta-

<sup>(4)</sup> Mel. de hop prince Li. 2, eap. 10. Gat. 10. gra . . . . . . . . 121.



# INSTITUCIONES

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DE

# DERECHO REAL DE ESPAÑA.

POR EL DOCTOR

## DON JOSÉ MARÍA ALVAREZ,

CATEDRÁTICO DE INSTITUCIONES DE JUSTINIANO EN LA REAL Y PONTIFICIA UNIVERSIDAD DE GOATEMALA.

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Segunda Edicion.

MÁDRID:

IMPRENTA DE D. JOSÉ M. REPULLÉS: 1839.

Se hallurá en Madrid en la libreria de Escamilla, calle de Carretas.



tra la voluntad de su marido se vaya á la casa de algun hombre sospechoso, porque se presume adúltera (1).

El 3.º cuando uno de los dos adquiere algunos bienes por donacion que separadamente le haya hecho el Rey ú otro alguno, ó por sucesion, por testamento ó abintestato de sus parientes (2). El 4.º cuando son castrenses ó provienen de salario ó estipendio militar; pero si estos los adquieren ó sirvieren á espensas de ambos, serán comunes, porque son frutos suyos, y estos, de cualquier calidad que sean, se comunican entre los casados (3). El 5.º cuando el marido enagena, constante el matrimonio, algunos de los gananciales ó todos, lo que puede hacer sin consentimiento ni licencia de su muger, no siendo castrenses ni cuasi castrenses, por no tener esta uso de su dominio hasta que su marido muere (4). Mas si por la enagenacion se prueba que la hace con dolo por damnificarla, se la comunicarán, pues tiene accion para repetir su mitad, justificando el dolo con que procedió el marido.

El 6.º cuando la muger vive deshonestamente estando viuda, pues por esto pierde los gananciales, debe restituirlos á los herederos de su marido, y viene á ser lo mismo en efecto que si no los hubiera adquirido (5). El 7.º cuando la muger renuncia los gananciales antes ó despues de haberse casado (6). El 8.º cuando el marido hace reparos y mejoras en la fortaleza y cercas en las ciudades, villas, lugares, casas y heredamientos de su mayorazgo; pues la muger, sus hijos, herederos y sucesores no tienen derecho á pedir la mitad de ellas, que como gananciales debia to-

<sup>(1)</sup> L. filt. tit. 2. lib. 3. del Fuero Real. , y 15. tit. 17. Part. 7.

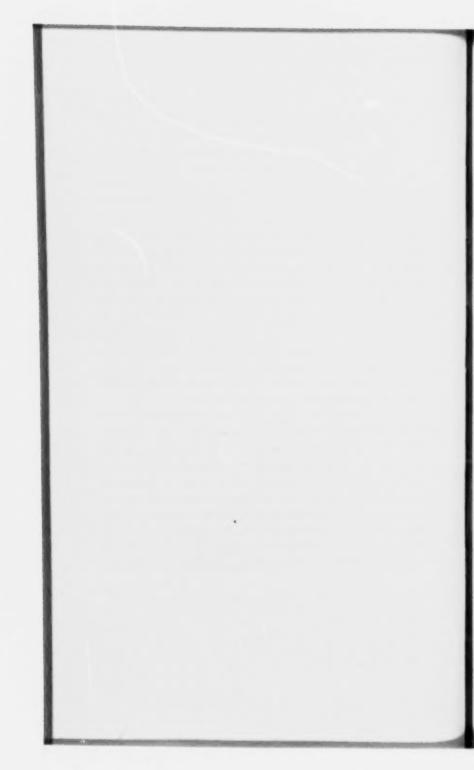
<sup>(</sup>a) Ll. 1. y 3. tit. 9. lib. 5. Rec.

<sup>(3)</sup> L. 5. de dicho tit.

<sup>(4)</sup> L. 5. tit. 9. lib. 5. de la Rec.

<sup>(5)</sup> Ll. 5. y 11. tit. 9. lib. 5. Rec.

<sup>(6)</sup> L. 9. del mismo tit.



# ELEMENTOS

## DEL DERECHO CIVIL Y PENAL

DE ESPAÑA.

PRECEDIDOS DE UNA RESEÑA HISTORICA,

POR LOS DUCTORES

O. Ledro Gomez de la Serna,

Q. Juan Manuel Montalban, ...
Catedrático de Jurisprudencia de la Universidad da Madrid.

CUARTA EDICION,

NULTANENTE CORREGIDA Y AFMENTADA POR LOS AUTORES.

TONO PRIMERO.

MADRID.

Imprenta de la Compania de Impresares y Libreros del Brano. 1851.



En otro lugar hemos indicado sus principales efectos, razon por la cual nos abstenemos de repetirlos.

### \$. VH.

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### Sociedad legal de los conyuges.

descenacida por los romanos, que hacian dueño al marido de las ganancias adquiridas durante el enlace, fue introducida por los visigodos al tiempo de la conquista. Partícipes las mugeres de las fatigas, espediciones y combates de sus maridos, se creyó que debian tambien participar de las presas hechas al enemigo. El Fuero-Juzgo elevó á ley esta costumbre, y la generalizó á toda clase de adquisiciones; y desde esta época se conoce entre nosotros la sociedad legal, que despues ha esperimentado algunas variaciones notables (1). Considerándola como un estímulo para

la edad habil para testar; cuando los hijos del donatario mueren sia descendencia y sia testar, vaelven los bienes à la persona que hizo la donacion, si vive, y en su defecto al abuelo ó abuela, y si estos hubieres muerto à los parientes mas cercanos (Loy 9 del Amejoramiento del Fuero). Por último, debe advertirse que en semejantes cases ni el donatario ni sus hijos pueden desponer de los bienes donados en perjuicio del donador sobreviviente (Ley 9, tit. VII, lib. III, Nov. Rec. de las leyes de Mayarra).

de liavarra).

(1) La ley 47, tit. II, lib. IV del Fuero-Juzgo dividia entre tos conyuges, a prorata de lo llevado por cada uno, las ganancias hechas durante el matrimonio: la legislacion vigente hace la division por mitad, sin considerar los bienes aportados.

Cataluña.—La seciedad legal de los cónyuges no es conocida en Cataluña: solo en el campo de Tarragona suele pactarse por costumbre que el marido asocia à la muger para compras y mejoras.

Navarra. En Navarra, en que está vigente la sociedad legal entre los cónyuges, à las veces se admite ademas de ellos à escitar la vigilancia, laboriosidad y cuidados de los consortes por sus recíprocos intereses, son indispu-

tables su utilidad y su conveniencia.

2 Modo de constituirse. - El tácito consentimiento que se supone en los cónyuges en el hecho de no renunciar à esta sociedad, le da origen : de consiguiente, puede decirse que para su constitucion solo se requiere el matrimonio. Pero esto debe entenderse cuando el matrimonio es seguido de su natural consecuencia, à saber: que la persona y los intereses de los casados se comuniquen, porque entonces solo existe la presuncion y la causa que la ley tiene para establecer la comunidad de ganancias: asi no comenzará á nuestro juicio la sociedad en los matrimonios contraidos por poder hasta que se ratifique y la muger comience á vivir con el marido: por esto dice la ley (1) estando de consuno. Al contraer el matrimonio la muger puede renunciar á las ganancias que se adquieran durante él, y en este caso no estará obligada

otras personas. Asi sucede cuande el cónyuge que sobrevive contrae segundo matrimonio sin haber hecho particion de la herencia ni entrega à los hijos del primero de la parte que les pertenece, en cuyo caso estos adquieren el derecho á una tercera parte de lo adquifido en el segundo enlace, quedando las etras dos para los cónyuges (ley 2, tk. X, lib. Ili de la Nov. Recop. de leyes de Navarra; y ley 50 de las Córtes de 4766 y 4766). Y es opinion comun fundada en principios de justicia y equidad, que si hay pérdidas en este segundo matrimonio, no sean participantes de ellas los hijos del primero, entregândoseles integramente todo lo que les corresponda. Para que la prescripcion de las leyes no sea ineficaz, y quede eludida por medio de una renuncia que hiciera à favor de su consorte el que se casara dos ó mas veces, está prohibido que puedan renunciarse los gananciales (Núm. 71 de la ley 48 de las Córtes de 4765 y 4766).

<sup>(4)</sup> Ley 4, tit. IV, lib. X de la Nov. Rec.



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à pagar parte alguna de las deudas que se contraigan durante la union conyugal (1).

Cosas que son objeto de la sociedad legal.-Pertenecen à esta sociedad y se llaman gananciales (2):

1.º Todos los bienes que durante el matrimonio adquiere cualquiera de los cónyuges por titulo oneroso (3).

2.0 El importe de las mejoras hechas durante el matrimonio en los bienes comunes y en los propios

de cada cónyuge (4).

3. Lo que el marido gana en la guerra, hacién-

dola á su costa y á la de su muger (5).

4.º Los frutos y rentas de los bienes que hubiesen llevado al matrimonio y de los que hubieren adquirido despues, bien sea con título oneroso ó lucrativo (6). Y sobre este particular debemos advertir que falleciendo uno de los cónyuges antes de la recoleccion de frutos, si estos ya aparecen se dividen entre el que sobrevivió y los herederos del difunto. y st no aparecen, corresponden al dueño de la heredad, con obligacion de resarcir las espensas hechas en su cultivo. Doctrina que tan solo ha de entenderse

<sup>(1)</sup> Ley 9, tit. IV, lib. X de la Nov. Rec. Navarra. Llama el derecho navarro conquistas, à lo que e da en Castilla el nombre de gananciales.

<sup>(3)</sup> Ley 4, tit. IV, lib. X de la Nov. Rec. Aragon.=Lo mismo sucede en Aragon (Observ. 53, de jure dot.).
(4) Leyes 3 y 9, tit. IV, lib. III del Fuero Real.

Aragon. Si el marido edificó ó plantó viña ú olivar en propiedad de la muger, ó hizo otra mejora, tendrá la cuarta parte de la propiedad, ó bien la mitad de la obra ó mejora que hizo (Observ. 42, de jure dot.).

<sup>(8)</sup> Ley 2, tit. IV, lib. X de la Nov. Rec.
(6) Ley 5 del mismo título y libro.

de los árboles y viñas, pues en los sembrados, aunque no aparezcan los frutos hasta despues de la muerte, se han de partir por mitad (1).

5.ª Los productos de la industria, oficio ó profesion que cualquiera de los cónyuges ejerciere (2).

Teniendo noticia de las cosas que son objeto de esta sociedad, no parecia preciso indicar las que no lo eran: sin embargo, como algunas leves se emplean en señalarlas, daremos sucintamente el estracto de su contenido. No se consideran gananciales, sino que pertenecen esclusivamente á uno solo de los cónyuges:

1.º Las donaciones reales hechas á uno de los

dos (3).

2. Lo que el marido ó la muger adquieren por título lucrativo (4).

3. Los bienes castrenses y oficios reales no ad-

quiridos á costa de ambos (5).

4. Los que cada uno justificare haber llevado al matrimonio (6), y el incremento que tuvieren por solo beneficio de la naturaleza.

La misma ley 5.

(5) Ley 5, tit. IV, lib. X de la Nov. Rec.
(6) Leyes 3 y 4 del mismo titulo y libro.

Aragon .- Lo mismo tiene lugar en Aragon (Observ. 23, de jure dot.).

Segun el Fuero del Bailio, concedido à la villa de Alburquerque, Jerez de los Caballeros y otros pantos, se comunican todos los bienes que los casados llevan al matrimonio, y los que adquieren por cualquier título.

Ley 10, tit. IV, lib. III del Fuero Real. Ley 5, tit IV, lib. X de la Nov. Rec.

Leyes 2 y 4 del mismo titule y libro. Aragon.=Lo mismo sucede en Aragon (Observ. 53, de jure dot.).



5.º Los edificios hechos en terreno de uno de los dos, que continuarán en su dominio con la obligacion de entregar la mitad de lo que se gastó en edificarlos, al otro cónyuge ó á sus herederos (1): doctrina fundada en los principios generales que rigen respecto á edificaciones hechas por uno en terreno de otro.

6.º Las permutas de las heredades pertenecientes á uno solo, pues la cosa adquirida se hará del que era dueño de la que se dió por ella: lo mismo sucede si se vendiese una posesion, y con su precio se comprase otra, porque las cosas permutadas ó compradas de este modo reemplazan á las que antes eran especialmente de uno. No hay necesidad de advertir que en estos casos, aunque las adquisiciones sean de uno,

los productos son de ambos cónyuges (2).

5 Administracion. — Mientras dura la sociedad conyugal los bienes gananciales pertenecen en comun á ambos cónyuges (3): mas el marido tiene no tan solo la administracion (4), sino tambien la facultad de disponer de ellos. En su consecuencia puede enagenarlos y hacer lo que mejor le parezca, salva una limitacion, á saber, que no lo haga con ánimo de defraudar ó de perjudicar á la muger. Disuelto el matrimonio se estinguen estos derechos, y cada cónyuge ó sus herederos adquieren el dominio y la administracion de la mitad de los gananciales, á no ser

(1) Ley 9, tit. IV, lib. III del Fuero Real

(4) Navarra.

Ley 11 del mismo título y libro.
 Aragon.—Si el marido se ausenta sin dejar procurador, la muger tiene la administracion de los bienes (Observ. 27, de jure dot.).

que la muger los hubiese renunciado en cualquier tiempo, ó que siendo viuda hiciere una vida relajada y disoluta, en cuyo caso los perderia tambien aun despues de haber tomado posesion de clios (1). Las mandas hechas por el marido á la muger no se imputan en su parte de gananciales (2).

6 Cargas de esta saciedad. - Son cargas de la so-

ciedad legal de gananciales:

 El sostenimiento de las obligaciones que pesan sobre el marido como gefe de la familia mientras dura el matrimonio.

2.º Las deudas contraidas durante el matrimonio, aunque lo sean solo por el marido, para atender á las obligaciones de la sociedad conyugal; pero no las que tuviere cada cónyuge antes de casarse, porque á estas estan solo obligados sus propios bie-

nes (5).

3. Las dotes y donaciones propter nupcias dadas por los cónyuges á uno de sus hijos, lo cual se verifica aun en el caso de que solamente el padre las hubiese hecho durante el matrimonio (4). La opinion que muchos intérpretes llevan de que tambien se deducirán de los gananciales cuando la promesa se hubiera hecho muerto ya el uno de los consortes, no tiene, en nuestro concepto, ningun fundamento sólido, porque la sociedad legal ya está entonces completamente disuelta.

Modos de acabarse.—Concluye esta sociedad :

(2) Ley 8, tit. IV, lib. X.

<sup>(4)</sup> Ley 4, tit. III, lib. X de la Nov. Rec.

<sup>(3)</sup> Ley 14, tit. XX, lib. III del Fuero Real; y ley 207 del Estilo.

<sup>(4)</sup> Ley & , tit. IV , lib. X.



4.º Por la renuncia de la muger hecha mientras

existe el matrimonio (1).

2.º Por la muerte de uno de los cónyuges. Juzgan algunos que aun despues de la muerte del marido ó de la muger, podrá continuar vigente esta sociedad, en virtud del convenio entre el que sobrevive y los herederos del difunto; error notable, segun creemos, y que procede de confundir en este caso la sociedad legal que concluyó definitivamente, con una convencional que ha podido constituirse.

 Por el divorcio (2), porque en este caso, del mismo modo que en el anterior, ha cesado la causa

de la sociedad.

<sup>(4)</sup> Ley 9, tit. IV, lib. X de la Nov. Rec. Por la renuncia que haçe antes ó despues del matrimonio, pierde tambien la muger el derecho á la mitad de los gananciales; pero no puede decirse que se concluye una sociedad que en el primer caso no existé todavía, y que en el segundo ha terminado ya. Algunos escritores, y entre otros Gregorio Lopez, sostienen que la muger durante el matrimonio no puede renunciar á los gananciales, fundândose en que esta renuncia viene à ser una donacion, y que estas se haltan prohibidas entre los cónyuges. La mayor parte de jurisconsultos españoles sin embargo siguen la opinion que nosotros adoptamos, y entre otros Gomez, Matenzo, Palacios Rubios, Covarrubias y Llamas, dando por razon que esta renuncia no es de aquellas en que en el acto uno se hace mas pobre y otro mas rico, pues que ni aun se sabo si habrá ó no gananciales al disolverse el matrimonio.

(3) Ley 4, tit. IV, lib. X de la Nov. Rec.

(40)

### **OEUVRES**

DE

# POTHIER

ANNOTÉES ET MISES EN CORRELATION

AVEC LE CODE CIVIL ET LA LÉGISLATION ACTUELLE

PAR M. BUGNET

PROFESIEUR DE COME CIVIL À LA PACULTÉ DE DROIT DE PARIS CREVALIER DE LA LÉGION D'BOXNEUR.

Beuxième Édition, conforme à la première.

TOME SEPTIÈME.

TRAITÉS DE LA PUISSANCE DU MARI, DE LA COMMUNAUTÉ,

DES DONATIONS ENTRE MARI ET FEMME.

CALIFORNIA

#### PARIS

HENRI PLON IMPRIMEUR DE L'EMPEREUR. BUE GARANCIÈRE, S. COSSE ET MARCHAL
LIBRAIRES DE LA COUR DE CASSATION
PLACE DAUPHINE, 27.

#### SECONDE PARTIE.

DU DROIT DES COMJOINTS SUR LES BIENS DE LA COMMUNAUTÉ.

467. Le droit du mari sur les biens de la communauté, est renfermé dans les deux axiomes suivants.

Premier axiome. — Le mari, comme chef de la communauté, est réputé seul seigneur des biens de la communauté tant qu'elle dure, et il en peut disposer à son gré, sans le consentement de sa femme 1.

Second axiome. — Ces dispositions néanmoins ne sont valables qu'autant qu'elles ne paraissent pas faites en fraude de la part que la femme et les héritiers de la femme ont droit d'y avoir lors de la dissolution de la communauté : il ne peut surtout s'en avantager, ni ses héritiers, au préjudice de cette part .

Nous développerons chacun de ces axiomes dans des articles séparés, et nous traiterons dans un troisième article, du droit de la femme.

#### ART. I". - Développement du premier axiome.

468. Nous avons vu dès le commencement de ce Traité, que la communauté de biens qui est établie, soit par la loi, soit par la convention, entre des conjoints par mariage, est en quelque façon in habitu, plutôt qu'in actu, et que le mari, tant qu'elle durc, est, en sa qualité de chef de cette communauté, réputé en quelque façon seul seigneur des biens dont elle est composée; parce qu'il a droit, en cette qualité, de disposer à sen gré, non-seulement de sa part, mais de celle de sa femme, sans lui en être comptable. « Le mari, dit la « coutume de Paris, en l'art. 225, est seigneur des meubles et conquêts immeu « bles par lui faits durant et constant le mariage de lui et de sa femme, »

Ces termes, par lui faits, se sont glissés dans le texte par inadvertance, et sont superflus. La disposition de la coutume n'est pas restreinte, par ces termes, aux seuls immeubles que le mari a lui-même acquis durant le mariage; elle comprend tous ceux dont la communauté est composée, même ceux que la femme y a apportée par une convention d'ameublissement. Ce principe est si constant, et les longues raisons de douter que Lebrun a apportées, sont si inutiles, qu'elles ne m'ont pas paru valoir la peine d'être rapportées.

469. Corollaire premier. — Le mari peut charger les biens de la communanté de toutes les dettes qu'il juge à propos de contracter pendant qu'elle

¹ Quoique le mari ait des pouvoirs fort étendus sur les biens de la communauté, cependant il n'est plus exact de dire qu'il en est seul seigneur et qu'il peut en disposer à son gré; il n'est plus qu'un administrateur. V les art. 1421 et 1422. C. civ.

Art. 1421 : « Le mari administre plétement applicable aujourd'hui.

Quoique le mari ait des pouvoirs | « seul les biens de la communauté.-

<sup>«</sup> Il peut les vendre, aliéner et hypo-« théquer sans le concours de la

<sup>«</sup> femme. »
Art. 1122: V. ci-dessus, p. 181,

<sup>\*</sup> Ce second axiome est encore complétement applicable aujourd'hui.

#### 11° PARTIE. DROITS DES CONJOINTS SUR LA COMMUNAUTÉ. 259

dure, non-seulement de celles qu'il contracte pour les affaires de la communauté, ou qui pourraient paraître la concerner, mais même de celles qui n'ont aucun rapport aux affaires de la communauté, même de celles qui ent pour cause les délits par lui commis 1, comme nous l'avons vu au long, suprà, nº 248.

470. Corollaire second.-Le mari peut, à son gré, perdre les biens de la communauté, sans en être comptable : il peut laisser périr par la prescription les droits qui dépendent de sa communauté, dégrader les béritages, briser les meubles, tuer par brutalité ses chevaux et autres animaux dépendants de la communauté, sans être comptable à sa femme de toutes ces choses,

471. Corollaire troisième.—Le mari peut alièner par des actes entre-vifs, à quelque titre que ce soit, même à titre de donation entre-vifs \*, envers telles personnes qu'il juge à propos, sauf à celles dont il sera parlé en l'article suivant, les différents biens dont la communauté est composée. Il peut charger lesdits biens d'hypothèques, non-seulement pour ses dettes, mais pour les dettes d'autrui : il peut les charger de servitudes. La coutume de Paris, en l'art. 225, ci-dessus cité, a elle-même tiré ces con-

séquences. Après avoir dit, le mari est seigneur, etc., elle ajoute : « En telle « manière qu'il les peut vendre, aliéner ou hypothéquer, et en faire et dispo-« ser par donation ou autre disposition entre-vifs, à son plaisir et volonté, « sans le consentement de sadite femme 3, à personne capable, et sans fraude.» Nous verrons dans l'article suivant l'explication de ces termes, d personne

capable, et sans fraude.

479. Presque toutes les coutumes ont à cet égard la même disposition que celle de Paris. Il y en a néanmoins quelques-unes qui ne regardent le mari que comme un simple administrateur cum liberd, et qui en conséquence permettent bien au mari de vendre, permuter et hypothéquer les biens de la communauté; mais qui ne lui permettent pas de les donner entre-vifs, si ce n'est pour sa part seulement. Telles sont les coutumés d'Anjou, art. 289; du Maine. art. 301; de Lodunois, chap. 26, art. 6.

La coutume de Saintonge, tit. 8, art. 68, excepte de la faculté qu'elle donne au mari de disposer sans sa femme des meubles et conquêts, ceux qui ont été

faits par le mari et sa femme, contractants ensemble.

D'autres en exceptent ceux qui ont été faits par la femme et par son indu-

strie. Bayonne, tit. 9, art, 29; Labour, tit. 9, art. 2.

178. Corollaire quatrième.-Il se trouve dans l'art. 233 de la coutume de Paris, où il est dit : « Le mari est seigneur des actions mobilières et posses-« soires, posé qu'elles procèdent du côté de la femme ; et peut le mari agir et « déduire lesdits droits et actions en jugement sans sadite lemme. »

La communauté étant composée de tous les biens mobiliers de chacun des conjoints, et le marj étant, en sa qualité de chef de la communauté, seul seigneur des biens de la communauté, tant qu'elle dure, la coutume a très bien tiré la conséquence qu'il est seigneur pour le total des actions mobilières de sa femme, et qu'il peut seul les déduire en jugement .

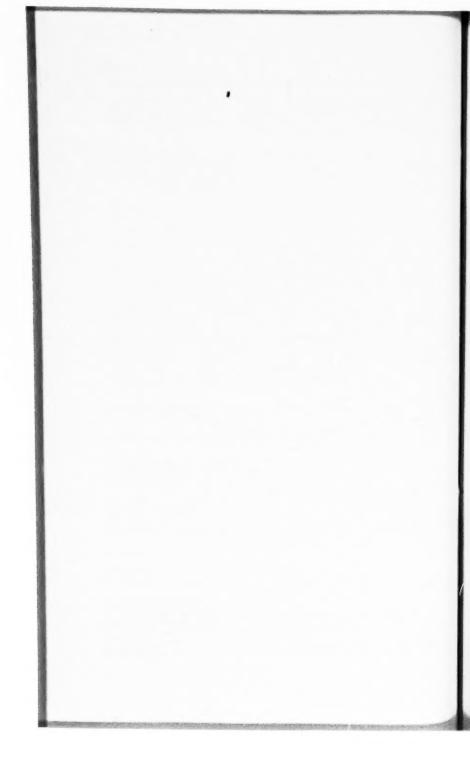
<sup>1</sup> V. art. 1421, ci-dessus, p. 158, note 2, et 1425, C. civ., p. 159, note 1.
<sup>2</sup> V. art. 1422, C. civ., ci-dessus,

p. 181, note 3.

\* C'est l'esprit de ces coutumes qui paraît avoir dirigé les rédacteurs du Code.

<sup>&</sup>lt;sup>3</sup> En comparant ce texte de la coutume avec les art. 1421 (V. ci-dessus, p. 258, note1) et 1422 (V.p. 181, note 3),

<sup>&</sup>lt;sup>5</sup> Cette conséquence est si évidente qu'elle parait presque inutile à énoncer. L'art. 1428 dit aussi que le mari. peut exercer les actions mobilières qui il est facile de voir la différence entre la appartiennent à la femme, ce qui reloi nouvelle et l'ancienne législation. I coit directement son application au



DF

## DROIT CIVIL FRANÇAIS

D'APRÈS LA MÉTHODE DE ZACHARIÆ

PAR MM.

#### C. AUBRY

Consoiller honoraire à la Cour de cassation, Commandeur de la Légion d'honneur.

#### C. RAU

Conseiller à la Cour de cassation, Officier de la Légion d'honneur.

QUATRIÈME ÉDITION

REVUE ET COMPLÉTÉE

TOME CINQUIÈME

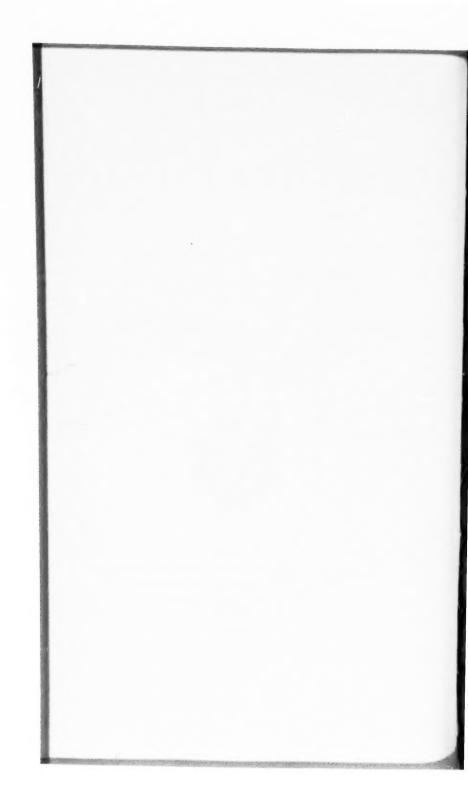


#### PARIS

IMPRIMERIE ET LIBRAIRIE GÉNÉRALE DE JURISPRUDENCE
MARCHAL ET BILLARD, IMPRIMEURS-ÉDITEURS
LIBRAIRES DE LA COUR DE CASSATION
Place Doupline, 39

\_\_\_\_\_

1872



tains biens en restent, de plein droit, exclus quant à la propriété. L'époux qui possède des biens personnels et distincts de sa part dans la communauté, peut, à raison de ces biens, avoir des prétentions à former contre la communauté, c'est-à-dire contre son conjoint, en tant que commun en biens, ou comme pouvant devenir propriétaire exclusif du fonds commun, et, réciproquement, se trouver débiteur envers la communauté. Il en est, à cet égard, de la communauté conjugale comme de toute autre société civile.

Par suite des rapports personnels que le mariage établit entre les époux, leurs droits et leurs obligations, comme communs en biens, sont régis, en ce qui concerne, soit leur position à l'égard des tiers, soit leurs rapports réciproques, par des règles spéciales et différentes pour l'un et pour l'autre.

En établissant la communauté de biens, comme régime matrimonial de Droit commun, nos coutumes avaient admis en principe que Le mari est seigneur et maître de la communauté. En vertu de cette maxime, la communauté était, au regard des tiers, représentée, d'une manière exclusive et absolue par le mari. Celui-ci pouvait, sans le concours de la femme, disposer librement des biens communs, non seulement à titre onéreux, mais même à titre gratuit ; et, d'un autre côté, les obligations par lui contractées pendant le mariage, n'importe de quelle manière et pour quelle cause, étaient susceptibles d'être poursuivies sur les biens communs, tout comme sur ses biens personnels, dont ils étaient censés faire partie <sup>3</sup>.

Mais, dans les rapports des époux entre eux, la maxime précitée n'avait pas une portée aussi absolue ; et la femme n'en était pas moins, en réalité, même durant le mariage, copropriétaire des biens de la communauté <sup>4</sup>. En cette qualité, elle était admise, encore qu'elle ne possédat pas de biens personnels, à provoquer

<sup>&</sup>lt;sup>2</sup> A ces divers points de vue, Desmoulin (in cons. Paris. § 57, n° 2, nov. cons., et § 109, vet. cons.), et après lui, Pothier (n° 3), ont pu dire du mari : Constante matrimonio, solus actu dominus. propter auctoritatem administrationis et alienandi potestatem; et de la femme : non est proprie socia, sed speratur fore.

<sup>&</sup>lt;sup>k</sup> Ce n'est qu'en envisageant séparément les rapports des époux communs envers les tiers, et leurs rapports réciproques, qu'il est possible de déterminer le véritable sens de la maxime: Le mari est seigneur et maître de la communauté et de caractériser la position du mari et celle de la femme pendant le mariage. La distinction, indispensable à faire à cet égard, a cependant échappé à Toullier (XII, 75 à 81) et à MM. Championnière et Rigaud (op. cit., IV, 2835 et 2836).



la séparation de biens et à quereller, à la dissolution de la communauté, les actes faits en fraude de ses droits.

Pour faire contrepoids aux pouvoirs illimités du mari sur les biens communs et garantir, dans une certaine mesure, la fortune personnelle de la femme contre les conséquences des engagements par lui contractés, la pratique coutumière avait, à l'occasion des Croisades, établi en faveur des veuves nobles, la faculté de renoncer à la communauté, pour s'affranchir de toute participation aux dettes. Cette faculté fut peu à peu étendue aux femmes des roturiers.

qui, se fondant sur les passages de Dumoulin et de Pothier, cités à la note précédente, el auxquels ils attribuent une portée absolue, soutiennent que la femme n'est pas, durant la communauté, copropriétaire du fonds commun, et qu'elle n'a qu'une simple expectative de copropriété, expectative qui se réalise ou s'évanouit, selon qu'elle accepte la communauté ou qu'elle y renonce. La méprise où ils sont tombés a d'autant plus lieu d'étonner, qu'en disant que, pendant le mariage, le mari est solus actu dominus, Dumoulin a eu soin d'ajouter, propter aucloritatem administrationis et alienandi potestatem; ce qui, en précisant et limitant sa proposition.indique nettement qu'il n'avait en vue que l'exercice, quant aux biens communs, des facultés ou actions inhérentes au droit de propriété, et qu'il n'a pas entendu, le moins du monde, décider, entre le mari et la femme, la question de la propriété de ses biens. L'opinion que Toullier et MM. Championnière et Rigaud prétent à Dumoulin et à Pothier, serait d'ailleurs en complète opposition avec le sentiment de tous les autres commentateurs des coutumes. « Si le mari, dit Laurière (Coutume de Paris, commentaire sur le titre X, art, 225., est seigneur des meubles et des conquêts immeubles, il n'en est pas propriétaire, si ce n'est de la moitié seulement, et s'il peut vendre, aliéner, hypothéquer, ce n'est que parce qu'il en a la libre administration, en qualité de chef de la communauté. « Voy. aussiFerrière. Compilation de tous les commentaires sur la coutume de Paris, art. 225, glose 1e, nº 1. Quoi qu'il en soit, la thèse que nous combattons paraît absolument incompatible avec les textes et l'esprit du Code civil, qui a singulièrement restreint le pouvoir du mari, quant à la faculté de disposer, à titre gratuit, des bieus communs. Elle est repoussée par ces locutions, la communauté com mence au jour du mariage, la communauté se compose activement et passivement, etc., et surtout par ces termes de l'art. 1492, la femme qui r**e**nonce veux toute espèce de droit sur les biens de la communauté. Au fond, on ne comprendrait point, si la fémme n'était pas, pendant le mariage, copropriétaire actuelle des biens communs, que les engagements contractés par elle, avec la simple autorisation du mari, pussent lier la communauté, même au cas où elle y renoncerait. Cpr. art, 1419. Battur, 1, 64. Duranton, XIV, 96. Rodière et Pont, I, 326 et suiv. Odier, I, 206 à 208. Marcadé, sur l'art, 1300, no 5, Troplong, II, 85) et suiv. Zachariæ, § 505, note 1ee, in fine. " Voy. § 517, note 1".





## **PRINCIPES**

619

# DROIT CIVIL

PAR

F. LAURENT.

PROPERSON & L'UNIVERSITE DE DANS

TOME VINGT ET UNIÈME.



BRUXELLES.

BRUYLAST-CHRISTOPHE & COMP.,

PARIS.

A. DURAND & PEIONE LAURIEL,

1876

jurisconsultes exprime cette pensée dans son style lapidaire. « Non, la femme n'est pas associée, dit Dumoulin. elle espère de l'être (1). » Pothier dit à peu près la même chose, quoique en termes plus mesurés : « Pendant que la communauté dure, le mari est réputé en quelque façon comme le seul seigneur et maître absolu des biens dont elle est composée. Le droit qu'y a la femme n'est regardé que comme un droit informe, qui se réduit à partager un jour les biens qui la composeront au jour de la dissolution (2). " Toullier a pris ces paroles au pied de la lettre, et il en a conclu que la communauté ne commence à exister que lorsqu'elle se dissout, bien entendu si la femme accepte, car si elle renonce, il n'y a pas et il n'y a jamais eu de communauté. Nous croyons inutile de réfuter cette erreur, ou ce paradoxe. Toullier lui-même s'est chargé de ce soin. car il avoue que les textes sont contraires à son opinion; mauvaise rédaction, dit-il, qu'il faut corriger; ce qui revient à dirê, comme le remarque le commentateur de Toullier, qu'une foule de textes disent le contraire de ce qui s'y trouve. Cela n'est pas sérieux, et nous ne discutons pas les plaisanteries. Il va de soi que Toullier est resté seul de son avis. Tous les auteurs le combattent, et vraiment il n'en vaut pas la peine. Un seul auteur, et un de nos meilleurs jurisconsultes, Championnière, a pris parti pour le paradoxe de Toullier (3); mais comme il ne donne pas de nouveaux arguments à l'appui d'une cause insoutenable, nous croyons inutile de recommencer un débat qui est vidé depuis longtemps.

Nous nous contentons de redresser les faits que les paradoxes altèrent toujours plus ou moins. Est-il vrai que, dans l'opinion de Dumoulin et de Pothier, il n'y avait pas de communauté? La femme est exclue de la gestion des intérêts communs, mais ces intérêts ne laissent pas d'être communs. Aussi Dumoulin ne dit-il pas qu'il n'y a pas de communauté, il dit seulement que la femme n'a pas les

Non est proprie socia, sed speratur fore « (Coutume de Paris, § 57, n° 2).

<sup>(2)</sup> Pothier, De la communauté, nº 3.

<sup>(3)</sup> Toullier, t. VI, 2, p. 77, no. 80 et 81, Championniere et Rigaud, t. IV. p. 6, no. 2835 et 2836.



droits d'un véritable associé, et Pothier ne répète pas même, avec les coutumes, que le mari est seigneur et maître, il se borne à dire qu'il l'est en quelque façon. Pourquoi ces restrictions? C'est que la femme est réellement copropriétaire. Les anciens auteurs le disent en toutes lettres. Ecoutons Laurière : « Si le mari est seigneur des meubles et des conquêts immeubles, il n'en est pas propriétaire, si ce n'est de la moitié seulement; et s'il peut vendre, aliéner, hypothéquer, ce n'est que parce qu'il en a la libre administration, en qualité de chef de la communauté (1). »

Tels sont les vrais principes de l'ancien droit : les deux époux sont associés, mais associés inégaux. Le code civil va plus loin. Il ne donne plus au mari la qualification de seigneur et maître; il ne lui conserve pas le pouvoir illimité qu'il avait dans les coutumes; en principe, le mari ne peut plus disposer à titre gratuit. Il faut donc dire, sous l'empire du code : le mari est seigneur et maître quand il s'agit d'actes à titre onéreux; il n'est plus maître et seigneur quand il s'agit d'actes à titre gratuit, et pourquoi ne l'est-il plus? Parce que la femme est associée, copropriétaire; or, l'on ne s'associe pas pour perdre, on s'associe pour gagner. Qu'importe que le mari puisse abuser de son pouvoir d'administration? La loi donne à la femme bien des priviléges à raison de la puissance qu'elle accorde au mari. La femme peut demander la séparation de biens, c'est-à-dire la dissolution d'une société qui menace de lui devenir fatale; le mari n'a pas ce droit. La femme peut renoncer à la communauté quand elle est désavantageuse; le mari n'a pas ce droit. Dira-t-on qu'en cas de renonciation, il n'y a jamais eu de communauté? On le dit d'ordinaire, mais cela est trop absolu. S'il n'y avait jamais eu de communauté, la femme pourrait reprendre le mobilier qui y est entré de son chef, tandis que la femme renoncante perd tout droit sur son mobilier; preuve qu'il y a eu société, et société malheureuse. La femme peut aussi

<sup>11</sup> Voyez les temoignages dans Aubry et Rau, t. V, p. 278, note 4.



## TRAITÉ THÉORIQUE ET PRATIQUE

## DROIT CIVIL

### DU CONTRAT DE MARIAGE

#### DES REGIMES MATRIMONIAUX

#### G. BAUDRY-LACANTINERIE

#### J. LE COURTOIS & F. SURVILLE

DE L'ENIVERSITE OF MORDEAUX

DOYEN HONORARD DE A FACULTE DE DROIT - PROFESSEURS DE DROIT CIVIL A LA FACULTÉ DE DROIT DE POITIERS

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L. LAROSE & L. TENIN, Directeurs

1906

de la communauté. La loi lui reconnatt alors le droit de demander en justice la séparation de biens (art. 1443).

247. La quasi-omnipotence du mari sur les biens communs a fait nattre une controverse dont il ne faut pas exagérer l'importance.

Il est une doctrine d'après laquelle la femme n'aurait aucun droit actuel sur les biens de la communauté. Ceux-ci pendant la communauté n'auraient qu'un seul propriétaire: le mari. C'est l'application rigoureuse de l'ancienne formule: Le mari est seigneur et maître de la communanté. Cette maxime se trouve dans le texte même des coutumes, notamment dans l'article 225 de la coutume de Paris. Son interprétation littérale peut invoquer l'autorifé considérable de Dumoulin. Celui-ci, dans ses notes sur l'ancienne coutume de Paris, disait en effet : « Constante matrimonio, maritus est pleno jure dominus omnium bonorum. » Il ajoutait que la femme n'avait qu'un droit en puissance, qui ne prenait sa réalisation qu'à la dissolution de la communauté. Non est socia mulier, disait-il, sed speratur fore (1). Cette thèse. adoptée par Pontanus (2) et que paraît également bien accueillir Pothier (\*), était déjà combattue par Perrière (\*). Nous croyons d'ailleurs que, même dans l'ancien droit, les formules ci-dessus mentionnées n'étaient qu'une façon énergique de dire que, durant la communauté, le droit de la femme était en quelque sorte annihilé par les pouvoirs presque illimités du mari, sans aller cependant jusqu'à la négation même de ce droit. Lorsque Dumoulin caractérisait le droit du mari et de la femme dans les termes que nous venons de rappeler, il voulait dire simplement que les

<sup>(\*)</sup> Molinari Opera, In consuctudine Parisi., § 57, n. 2. Nov. consuct., cl. § 109, Vet. consuct.

<sup>(</sup>i) Pontanus, Sur la contume de Blois, II, p. 241.

<sup>(3)</sup> Pothier. Traité de la communauté, n. 3,

<sup>(4)</sup> Ferrière, Compilation de tous les commentaires sur la contume de Paris, III, p. 10, n. 32, D'après Ferrière, le froit de communante au profit de la temme « est acquis par le contrat de marcage ou par la disposition de la contume dés la célébration d'icelui, ce droit n'est que rirtuel et habituel et non actuel pendant le marcage, mais il ne peut lui être ôte, elle ne peut pas meme y renouver avant la mort de seu mari, ».



créanciers personnels de l'épouse, à la différence de ceux du mari, ne pouvaient pas se faire payer sur les biens communs. Laurière, dans son commentaire sur l'article 225 de la coutume de Paris ('), faisait déjà remarquer que le mari, seigneur et mattre de la communauté, n'en est pas cependant propriétaire, qu'il n'est qu'un administrateur avec des pouvoirs étendus allant jusqu'à l'aliénation. L'ancienne règle vise donc les pouvoirs considérables du mari, mais n'a pas trait à la propriété des biens. Le mari, sous la réserve de la renonciation possible de la femme à la communauté, n'est propriétaire que de la moitié des biens communs (').

Il n'est donc guère surprenant que la théorie, déniant tout droit à la femme au cours de la communauté, n'ait rallié au xix siècle que deux suffrages (3). Depuis le code civil, elle est bien difficile à soutenir, surtout en présence de l'article 1422 qui refuse au mari le droit de faire des donations d'immeubles communs. En étudiant les droits de poursuite des créanciers du mari ou de la communauté sur les biens communs, nous verrons dans quelle mesure il est vrai de dire que, aux yeux des tiers, les propres du mari et les biens communs semblent ne faire qu'un senl patrimoine.

248. D'ailleurs l'intérêt pratique du débat est assez vague. Du droit de copropriété actuel de la femme durant la communauté, on a tiré argument pour valider les donations d'immeubles communs faites conjointement par le mari et la femme (¹), et pour justifier le droit de cette dernière de demander la séparation de biens (³).

Mais le droit de l'épouse ne devrait-il être qu'un droit subordonné à cette condition suspensive que la femme ou

 <sup>(1)</sup> Laurière, Sur l'art. 225 de la contume de Paris. — Happ, l'art. 101 de la contume d'Angoumois.

<sup>(</sup>i) Duranton, op. cit., XIV, n. 96; Marcadé, op. cit., sur Parl. 1390, n. 5; Troplong, op. cit., II, n. 854 s.; Rodière et Pont, op. cit., I, n. 331; Amta, op. cit., III, n. 543; Aubry et Run, op. cit., V, § 505, texte et noie 4, p. 278-279.

<sup>(\*)</sup> Toullier, op. cit., XII, n. 75 à 81; Championnière et Higaud, Tr. des droits d'enreg., IV, n. 2815, 2836.

<sup>(1)</sup> V. infra, 1, n. 674.

<sup>)</sup> V. également et cpr. Colmar, 25 fév. 1857, S., 57, 2, 321, D., 57, 2, 88,



CONVUGE SUPERSTITE .- Tiene recho, por razón de gananciales, á la mi-tal de los bienes adquirilos durante el durante sq matrimonio con el consorte difunto

DISPOSICIONES SOBRE SOCIEDAD LEGAL.-Las contenidas en el Cótico Ci son aplicables á les matrimonies contrafilos antes de la vigencia de este porque son de derecho público.

SOCIEDAD LEGAL -- Lab principios to tablecidos sobre esta materia, por la le-gislación antigua, son iguales á los consagrados por la vigente.

SINE ACTIONE AGIS .- Esta exergeron es de las reconceidas y autorizadas por la loy; supuesto que su objeto no es destruir ó diferir la reción, sino simplemente negar la demanda.

COSTAS.-Las de ambes instancias son à cargo del litigante condenado por dusentencias conformes de toda conformidad

México, Mayo veinticinco de mil novecientos cuatro.

Vistos los autos del juicio ordinario promovido por la señora Telésfora García. patrocinada por el señor Licenciado Antonio Ramos Pedrucza, contra la sucesion del senor Lázaro Contreras, representada por su albacea la señora Gregoria Montes de Oca, todos vecinos de esta ciudad, sobre la liquidación de la sociedad legal proveniente del matrimonio celebrado por la mencionada señora con el autor de la herencia.

Resultando, primero: que la señora García expresó en el escrito respectivo, que contrajo matrimonio canónico con el senor Lázaro Contreras, en quince de Enero de mil ochocientos cincuenta y siete, en la parroquia de San Esteban Axapusco, Distrito de Otumba, Estado de México, en cuyo matrimonio tuvieron seis hijos; que à la celebración de él, ninguno de los cónyuges aportó bienes, habiendo adquirido Contreras después dos casas, una en la calle del Peñón número uno, y otra en la segunda calle de Granada, que lleva el número tres: que su marido contrajo relaciones ilicitas con la señora Gregoria Montes de Oca, à cuyo helo se en- existió entre el autor de la herencia y la

el dia nueve de Abril de mil ochocientos noventa y seis, en el cual instituyó herederos à los hijos que tuvo de esa unión, y solo dejo una corta pensión alimenticia á los legitimos; y por lo mismo demandaba à la sucesión de su marido la liquidación de la sociedad legal que existió entre éste y ella por virtud de su matrimonio, y que se cor denara à la sucesión al pago de los gavanciales que le corresponden, esto es, la mitad de los bienes que aparecen listados en el inventario respectivo.

Resultando, segundo: que corrido traslado de la demanda, lo evacuó la señora Montes de Oca negándola, porque no son aplicables al caso los preceptos del Código Civil, sino los de legislación antigua, y opuso la excepción sine astrone agis, Abjerta la dilación probatoria, el actor no rindió prueba alguna y la demandada produjo las siguientes probanzas: 1. Documental, que consiste en la copia certiticada del testamento y en el acta del matrimonio canónico, presentados con la demanda; en el testimento de la escritora de compraventa de la casa número uno de la calle del Peñón; en un acuerdo del Avantamiento relativo à la designación de números para diversas casas de la primera calle de Granada, entre ellas la número tres: H. Confesión judicial, mediante. Las persiciones que absolvió la señora Garcia.

Resultando, tercero: que en diez de Noviembre último, el Juez pronunció la sentencia cuya parte resolutoria dice: «l. La parte actora probó con los documentos respectivos que acompañó á su demanda, la acción deducida en la misma. - II. La parte demandada no probó su excepción - III. Se condena, en consecuencia, à la sucesión de Don Lazaro Centreras á formar dentro del termino de ocho días, la liquidación de la socieda legal que rfemó y murió, otorgando su testamento señora Telesfora García de Contreras, y á





pagarle, à título de gananciales dentro de tercero día de terminada la liquidación referida, la mitad del valor de los bienes testados, -- IV. Se condena á la parte demandada al pago de las costas causadas en esta instancia.

Resultando, cuarto: que la señora Monter de Oca interpuso el recurso de apelación contra esta sentencia y admitido que le fué en ambos efectos, se ha substanciado ante esta Sala, habiendo tenido lugar la vista el día veintiuno del corriente mes con la asistencia solamente del señor licenciado Ramos Pedrueza.

Considerando, primero: que por los documentos presentados por la señora García, que por pertenecer á la clase de los públicos, según los artículos cuatrocientos treinta y nueve fracción cuarta, y quinientos cincuenta y tres del Código de Procedimientos, merecen entera fe, está plenamente demostrado que la mencionada señora contrajo matrimonio canónico en quince de Enero de mil ochocientos cincuenta y siete, con el señor Lazaro Contreras, y que éste adquirió las casas mencionadas durante es matri monio. En consecuencia resulta demostrado el derecho, ó mejor dicho la acción ejercitada por la señora García en este juicio, y que le pertenece la mitad de los bienes adquiridos durante su matrimonio à título de gananciales, conforme á los artículos dos mil ocho y dos mil veintinueve del Código Civil.

Considerando, segundo: que no es exacto como afirmó la señora demandada al contestar la demanda que la aplicación de dichos preceptos al presente caso importa una retroacción de ellos, y que sólo deben aplicarse los de nuestra antigua legislación; porque prescindiendo de que las leyes que arreglan la sociedad conyugal, en cuanto se refiere á aquellos casos en que los cónyuges nada determinan acerca de ella, son de derecho público, y por lo mismo se pueden y deben aplicar de la sucesión demandada.

á los matrimonios contraídos antes de su vigencia, hay que tener en cuenta que nuestra antigua legislación establecía los mismos principios. En efecto, la ley 1ª, título 3º, libro 3º, del Fuero Real, dice: «Toda cosa que el marido y mujer ganaren o compraren estando de consuno, háganlo ambos por medios; y las leves 1ª y 3ª, título 4º, libro 1º de la Novísima Recopilación, dicen: «Magüer que el marido haya más que la mujer, ó la mujer más que el marido, quier en heredad, quier en mueble, los frutos sean comunes á ambos á dos», y la ley 14 de Toro declara que la mujer, muerto el marido, adquiere la propiedad y la plena posesión y la administración de la mitad de las ganancias hechas en el matrimoy puede, disponer de ellas libremente.

Considerando, tercero: que es consecuencia de lo expuesto que ya se aplique la legislación antigua, vigente cuando la señora García se unió en matrimonio con el señor Contreras, ya los preceptos del Código Civil, siempre resultará que tiene los mismos derechos sobre los bienes adquiridos durante ere matrimonio, y por tanto, acción para exigir de los herederos de su consorte el pago de la mitad de los gananciales, y la obligación de éstos de proceder á la liquidación de la sociedad legal y entrega de los gananciales, obligación que está sancionada por los artículos dos mil cincuenta y seis y siguientes del citado Código.

Considerando, cuarto: que la excepción sine actione agis no tiene el carácter propio de las excepciones reconocidas y autorizadas por la ley, porque no cumple con el objeto que les atribuye ésta, porque no se dirige á destruir ó á diferir la acción ejercitada por el actor, (artículo veinte y seis, Código de Procedimientos), sino que importa solamente la negativa de la demanda, y por lo mismo, no hay que examinar si ha sido probada por la albacea



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de los Territo alguno de han remitido lo cual no ha de que en todo yan dejado de inudiciales en el rao de que instruídos resos respectivos, la es de Paz no han te-(isposición legal aludi-Ma, de acuerdo con la 1ª cesario recordar á los la obligación que tienen propia Sala todos los exorden penal, una vez que Allos sentencia definitiva, y ede debidamente notificada y ia, en su caso, á quienes corresi la inteligencia de que la remierá efectuarse en el perentorio o de veinticuatro horas, que fija el to 15 de la Ley Transitoria de Pronientos. Expídase la circular respecy publiquese en los periódicos Diaria find y Diario de Incispendencia, -- Jusi dinta. - Epigmenia Ganzáles de la Vega, ecretario.

Tribunal Superior del Distrito. Tercera Sala.

Presidente, Lic. Manuel Mateos Alarcón, Magistrado, Francisco Belmar, Trinidad González de la Vega Secretario Angel García Peña.

Gircía Telésfora contra Contreras Lázaro. su sucesión.

Juicio ordinario sobre liquidación de socledad legal.

SUMARIO.

ACTAS DE MATRIMONIO CANONICO. Secretario. Las extendidas antes del establecimiento dei Registro Civil, son documentos públicor y como tales merecen entera fe.

Considerando, quinto: que de lo expuesto se infiere que la sentencia apelada es arreglada á derecho, y por tanto, que debe ser confirmada y condenada la señora apelante á pagar las costas causadas en las dos instancias del juicio, según el artículo ciento cuarenta y tres, fracción cuarta del Código de Procedimien-

Por lo expuesto, y con fundamento de los preceptos legales citados, se confirma la sentencia apelada y se falla:

Primero: la señora Telésfora García probó la acción que dedujo en este juicio.

Segundo: en consecuencia, se condena á la sucesión del señor Lázaro Contreras, á proceder á la liquidación de la sociedad legal que existió entre dicha señora y el señor Contreras, y á entregarle la porción de gananciales que en aquélla resulten á su favor.

Tercero: Ss condena á la señora Montes de Oca en su calidad de albacea de la sucesión demandada, al pago de las costas causadas en las dos instancias del juicio.

Hágase saber, y con testimonio de esta resolución, vuelvan los autos al Juzgado de su origen, para los efectos legales, archivándose á su vez el Toca.

Así, por unanimidad, lo proveyeron los señores Presidente y Magistrados de la 3º Sala del Tribunal Superior de Justicia del Distrito Federal, y firmaron hoy, cuatro de Junio del mismo año en que expensó los timbres correspondientes la parte de la señora Telésfora García. - Monnet Maters Alarcin. - Francisco Belmar. - F. Gonzáles de la Vega. - A. García Peña,



## In the Supreme Court

WM. R. STANSBURY

OF THE

### United States

OCTOBER TERM, 1924

No. 11 493

UNITED STATES OF AMERICA.

Plaintiff in Error.

VS.

R. D. Robeins, Jr., et al., Executors,

Defendants in Error.

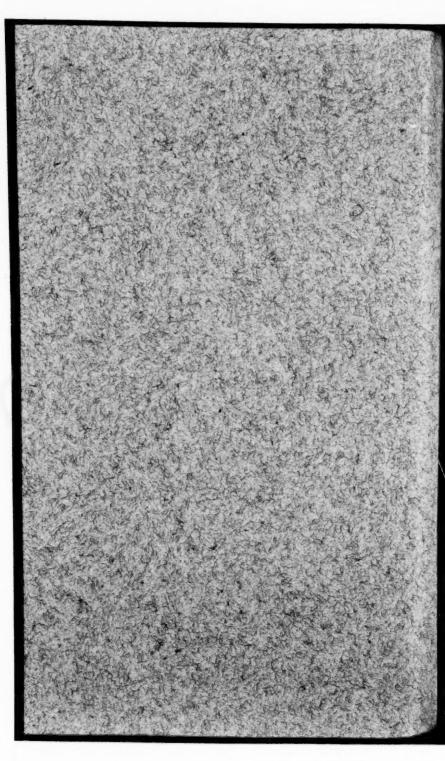
MOTION BY JOHN C. ALTMAN AND RICHARD S. GOLDMAN,
FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

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BRIEF OF AMICI CURIAE, JOHN C. ALTMAN AND

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## In the Supreme Court

OF THE

#### United States

OCTOBER TERM, 1924

No. 1249

UNITED STATES OF AMERICA,

Plaintiff in Error,

VS.

R. D. Robbins, Jr., et al., Executors,

Defendants in Error.

## MOTION BY JOHN C. ALTMAN AND RICHARD S. GOLDMAN, FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

The undersigned move for permission to file the following brief as amici curiae herein.

The question involved in the present case is whether, under the Revenue Act of 1918, a husband and wife, domiciled in California, may each return, for income tax purposes, one-half of the income from the community property.

The undersigned appear as the attorneys of record in the following cases, now pending in the courts hereinafter mentioned, wherein the identical question involved in this case is presented for determination:

Walter A. Haas, et al., v. the United States of America, now pending in the United States District Court for the Northern District of California, Second Division, and bearing file No. 17349;

Juda Newman, et al., v. the United States of America, now pending in the United States District Court for the Northern District of California, Second Division, and bearing file No. 17272:

Marcus S. Koshland, et al., v. the United States of America, now pending in the Court of Claims of the United States, and bearing file No. E-130;

Henry Sinsheimer, et al., v. the United States of America, now pending in the Court of Claims of the United States, and bearing file No. E-129.

Due to the fact that the Solicitor General of the United States selected the present case as a test case, no opportunity will be afforded the undersigned to present their views in connection with the determination of the issue involved. The amount of refunds involved in the above mentioned cases, wherein the undersigned are the attorneys of record, is very considerable, and the undersigned therefore respectfully request that this court permit them to file the following brief as amici curiae in the above entitled matter.

The attorneys for defendants in error have consented in writing to the filing of a brief by the undersigned.

Dated, San Francisco, September 26, 1925.

> JOHN C. ALTMAN, RICHARD S. GOLDMAN, Amici Curiae.

# In the Supreme Court

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OCTOBER TERM, 1924

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UNITED STATES OF AMERICA.

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Defendants in Error.

# BRIEF OF AMICI CURIAE, JOHN C. ALTMAN AND RICHARD S. GOLDMAN.

### STATEMENT OF QUESTION INVOLVED.

Leave having been first obtained, we submit the following brief as amici curiae.

The sole question involved in this case is:

May a husband and wife domiciled in California, render and file separate income tax returns under the Revenue Act of 1918, wherein each shall report, as gross income, one-half of the income which, under the law of California, becomes simultaneously with its receipt, community property?

It is the contention of the Government that a husband in California must report in his income tax return and pay a tax upon the entire income accruing or received from community property, or which becomes, simultaneously with its receipt, community property. It is the contention of the taxpayers herein and of amici curiae that a husband and wife may each file a separate income tax return and may each report therein one-half of such income.

The pertinent provisions of the Revenue Act of 1918 are as follows:

- (1) That there shall be levied, collected and paid for each taxable year upon the "net income of every individual" a normal tax and a surtax in specified amounts. (Sections 210 and 211.)
- (2) "Net income" is deemed to be "gross income" as defined in Section 213, less the deductions allowed by Section 214. (Section 212.)
- (3) "Gross Income" includes "gains, profits and income derived from salaries, wages or compensation for personal service \* \* \* of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce or sales or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities or the transaction of any business carried on for gain or profit or gains or profits, and income derived from any source whatever. \* \* \*" (Section 213.)

Restating the issue, it becomes at once apparent that the determinative question is:

What was the nature of the interest of a husband and wife, domiciled in California, in community property in the year 1918? If the wife had such an interest in the community property of herself and her husband as would amount to an equal proprietary share or vested interest therein, then it would seem to follow as a corollary that one-half of the income therefrom belonged to her, and not only had she the right to make a separate income tax return of her one-half thereof, but she was required so to do under the Revenue Act of 1918.

#### I.

### THE COMMUNITY PROPERTY LAW IN CALIFORNIA PRIOR TO 1917.

The community property law has existed in California ever since its admission as a state more than seventy-five years ago.

The first constitution of California adopted in 1849 provided, in Article XI, Section 4 thereof:

"All property, both real and personal, of the wife owned or claimed by her before marriage and that acquired afterward by gift, devise or descent, shall be her separate property and laws shall be passed more clearly defining the rights of the wife in relation as well to her separate property as to that held in common with her husband. Laws shall also be passed providing for the registration of the wife's separate property."

The first legislature of California was convened in 1850 and, pursuant to the injunction contained in the constitution of 1849, "separate" and "common" property were defined, and the rights of the spouses upon dissolution of the marriage, both by death and

divorce, were clearly set forth. True to the old Spanish law existing in California prior to the admission of California as a state of the Union, and true to the concept of that Spanish community property law, the legislature of 1850 gave to the husband

"full power of management and control of the property during existence of the marriage." (Statutes of 1850, page 254 et seq.)

Subsequent legislatures made various changes in the statutory law affecting community property, but all of these changes were for the purpose of placing greater checks upon the husband's right and powers of management and control of the community property. In no instance has any legislative enactment disturbed the community property system or taken from the wife any interest or right of ownership involved in the concept and system of "comon property." On the contrary, increasing rights have steadily been accorded to the wife, and decreasing powers of control and management have been placed in the hands of the husband.

Since the enactment of the community property system in 1850, there has been a multitude of decisions by the appellate courts of California, wherein an apparent attempt has been made to define the nature of the reciprocal interest of the husband and wife in the common property. It is neither our purpose to dwell upon these decisions nor to analyze them minutely. Suffice it to say that there exist in the judicial decisions of California two distinct and divergent lines of decisions—one which has been appropriately, or rather inappropriately, termed "the

heir expectant theory"—the other which may be appropriately called "the vested interest theory."

In the former line of decisions, the courts of California have used general language purporting to recognize, during the existence of the marital community, the complete ownership of the common property in the husband, and likening the interest of the wife to a mere expectancy, like that of an heir. In other words, the appellate courts regarded the wife as taking one-half share of the community property by inheritance upon the death of the husband.

In the other line of judicial decisions, while it is true that the interest of the wife in the marital community during its existence has not been denominated in so many words as "a vested interest," nevertheless "vested rights" have been recognized in the wife and these rights have been held inviolate and subject to full protection and recognition; and in addition thereto, the interest of the wife has been regarded as passing to her as survivor of her husband, by virtue of her ownership in the common property as the survivor of the marital community—as opposed to her taking by inheritance.

As aptly pointed out by the learned District Judge in the case of *Blum v. Wardell*, 270 Fed. 309, and by both Attorney General Daugherty in his opinion of March 8, 1924, and Attorney General Stone in his opinion of October 9, 1924, these two divergent lines of decisions are impossible of reconciliation. The point that we wish to stress in this connection is, that there existed prior to 1917, and there still exists up

to the present time, a conflict of decisions by the courts of last resort in California with respect to the nature of the interest of a wife in community property as applied to the state of the law in California in force prior to the legislative amendments and enactments of 1917.

In passing, we might point out that

"the confusion in the decisions of the California courts has undoubtedly arisen from the fact that the courts have been attempting in their opinions to apply the terminology of the common law to community property, which embodies a legal concept wholly foreign to the common law and to which the terminology of the common law cannot be applied with accuracy and precision. In most of the California decisions in which it was asserted that the right of the wife is a mere expectancy or right of inheritance, the same result could have been reached if the court had rested its decision upon the view that the wife had a vested interest in the community property, subject to a power of disposition vested in the husband (See Spreckels vs. Spreckels, 116 Cal. 339; Estate of Wickersham, 138 Cal. 355; Dargie vs. Patterson, 176 Cal. 714); whereas in other cases holding that the wife's interest in the community property is a vested interest, it seems to be necessary to describe the legal relationship of the husband to the wife's interest as a power of disposition, in order to justify the decisions actually rendered (See Estate of Brix, 181 Cal. 667: Taylor vs. Taylor, 218 Pac. 757). however, only suggests that a common law term may be resorted to, to describe the incidents of community property in some respects, but be wholly inappropriate to describe them for other purposes. This was recognized by the United States Supreme Court in Arnett vs. Reade, 220 U. S. 311, at 320."

(Opinion of Hon. Harlan Stone, Attorney General of the United States, given to the Secretary of the Treasury under date of October 9, 1924.)

#### II.

#### THE COMMUNITY PROPERTY LAW IN CALIFORNIA SINCE 1917.

In 1917 the community property system in California was both clarified and changed by various legislative enactments. In 1923 further changes were made.

In order to approach this matter from an historical standpoint, we shall now set forth the pertinent provisions of the statutory law in California which were in effect both prior and subsequent to July, 1917.

Prior to July 27, 1917, Section 137 of the Civil Code read as follows:

"Expenses of action for Divorce (Alimony). When an action for divorce is pending, the court may, in its discretion, require the husband to pay as alimony any money necessary to enable the wife to support herself and her children, or to prosecute or defend the action.

Permanent Support: When the husband wilfully deserts the wife or when the husband wilfully fails to provide for the wife or when the wife has any cause of action for divorce as provided in section ninety-two of this code, she may, without applying for a divorce, maintain in the Superior Court an action against him for permanent support and maintenance of herself or of herself and children. During the pendency of

such action the court may, in its discretion, require the husband to pay as alimony any money necessary for the prosecution of the action and for support and maintenance, and execution may issue therefor in the discretion of the court. The final judgment in such action may be enforced by the court by such order or orders as in its discretion it may from time to time deem necessary, and such order or orders may be varied, altered, or revoked at the discretion of the court."

By an amendment effective as of July 27, 1917, the following clause was added to Section 137 of the Civil Code:

"The court, in granting the wife permanent support and maintenance of herself, or of herself and children, in any such action, shall make the same disposition of the community property and of the homestead, if any, as would have been made if the marriage had been dissolved by the decree of a court of competent jurisdiction."

Prior to July 27, 1917, Section 172 of the Civil Code provided:

"Power of Husband Over Community Property: The husband has the management and control of the community property, with the like absolute power of disposition, other than testamentary, as he has of his separate estate; provided, however, that he cannot make a gift of such community property, or convey the same without a valuable consideration, unless the wife, in writing, consent thereto; and provided also, that no sale, conveyance or encumbrance of the furniture, furnishings and fittings of the home, or of the clothing and wearing apparel of the wife or the minor children, which is community property shall be made without the written consent of the wife."

In 1917, Section 172 was amended so as to make it apply solely to *personal* property and Section 172 (a) of the Civil Code was enacted for the first time so as to deal with *real* property; these sections now read as follows:

"See. 172. The husband has the management and control of the community personal property, with like absolute power of disposition, other than testamentary, as he has of his separate estate: (provided, however, that he can not make a gift of such community personal property or dispose of the same without a valuable consideration, or sell, convey, or encumber the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the wife or minor children that is community without the written consent of the wife).

Sec. 172a. The husband has the management and control of the community real property, but the wife must join with him in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered; provided, however, that the sole lease, contract, mortgage or deed of the husband, holding the record title to community real property. to a lessee, purchaser or encumbrancer, in good faith without knowledge of the marriage relation. shall be presumed to be valid; but no action to avoid such instrument shall be commenced after the expiration of one year from the filing for record of such instrument in the recorder's office in the county in which the land is situate."

It should be added that in 1925, Section 172 (a) was amended so as to exempt from its purview any transfer, lease, or mortgage of real property between husband and wife.

Sections 1401 and 1402 of the Civil Code, prior to August 18, 1923, stood as follows:

"Sec. 1401. Distribution of the common property on the death of the wife. Upon the death of the wife, the entire community property, without administration, belongs to the surviving husband, except such portion thereof as may have been set apart to her by judicial decree, for her support and maintenance, which portion is subject to her testamentary disposition, and in the absence of such disposition, goes to her descendants or heirs, exclusive of her husband.

"Sec. 1402. Distribution of common property on death of husband. Upon the death of the husband, one-half of the community property goes to the surviving wife, and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition goes to his descendants, equally, if such descendants are in the same degree of kindred to the decedent; otherwise, according to the right of representation; and in the absence of both such disposition and such descendants, is subject to distribution in the same manner as the separate property of the husband. In case of the dissolution of the community by the death of the husband, the entire community property is equally subject to his debts, the family allowance, and the charges and expenses of administration."

By legislative enactment in 1923, the foregoing sections were changed to read:

"1401. Upon the death of either husband or wife, one-half of the community property belongs to the surviving spouse; the other half is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse, subject to the provisions of section one thousand four hundred and two of this code.

"1402. Community property passing from the control of the husband, either by reason of his

death or by virtue of testamentary disposition by the wife, is subject to administration, his debts, family allowance and the charges and expenses of administration; but in the event of such testamentary disposition by the wife, the husband, pending administration, shall retain the same power to sell, manage, and deal with the community personal property as he had in her lifetime: and his possession and control of the community property shall not be transferred to the personal representative of the wife except to the extent necessary to carry her will into effect. After forty days from the death of the wife, the surviving husband shall have full power to sell, lease, mortgage or otherwise deal with and dispose of the community real property, unless a notice is recorded in the county in which the property is situated to the effect that an interest in the property, specifying it, is claimed by another under the wife's will."

Prior to July, 1917, a wife in California was held to be liable for the payment of a state inheritance tax on her share of the community property to which she comes into possession on the death of her husband. (In Re Moffitt's Estate, 153 Cal. 359; 95 Pac. 653.) To relieve the surviving wife from this tax, the California legislature of 1917 enacted inter alia the following (Chap. 589 Stats. of California, 1917, p. 880):

"Sec. 1. \* \* \* (2) The words 'estate' and 'property' as used in this act shall be taken to mean the real and personal property or interest therein of the testator, intestate, grantor, bargainor, vendor, or donor passing or transferred to individual legatees, devisees, heir, next of kin, grantees, donees, vendees, or successors and shall include all personal property within or without the state; provided that for the purpose of this act the one-half of the community property which

goes to the surviving wife on the death of the husband, under the provisions of section one thousand four hundred two of the Civil Code, shall not be deemed to pass to her as heir to her husband, but shall, for the purpose of this act, be deemed to go, pass or be transferred to her for valuable and adequate consideration, and her said one-half of the community property shall not be subject to the provisions of this act;

#### III.

COMMUNITY PROPERTY LAW OF CALIFORNIA, AS AMENDED SINCE 1917, HAS NEVER BEEN CONSTRUED BY THE APPELLATE COURTS OF CALIFORNIA, AND THEREFORE THE FEDERAL COURTS MUST ADOPT THEIR OWN CONSTRUCTION.

The foregoing statutory changes in the community property law of this state as enacted in 1917 and also as enacted in 1923 have never been construed by the appellate courts in California. It is also to be noted in this connection, as previously referred to herein, that a conflict of authority exists in California upon the question of the nature of the wife's interest in the marital community with respect to the community property law as it existed prior to 1917.

Under either circumstance, it is not only the privilege, but it is the duty of a federal court to adopt its own construction of the laws of California, particularly in view of the fact that the sole question here involved is one of the incidence of a federal income tax.

In Camunas v. New York & P. R. S. S. Co., 260 Fed. 40, the Circuit Court of Appeals for the First Circuit said:

"While it is manifestly undesirable that a Porto Rican Statute should receive its first judicial construction in the federal court, we may not, on that ground alone, refuse the plaintiff relief, if otherwise clearly entitled thereto."

In Burgess v. Seligman, 107 U. S. 20; 27 L. Ed. 359, the Supreme Court used this language:

"We do not consider ourselves bound to follow the decision of the state court in this case. When the transactions in controversy occurred, and when the case was under the consideration of the circuit court, no construction of the statute had been given by the state tribunals contrary to that given by the circuit court. federal courts have an independent jurisdiction in the administration of state laws, co-ordinate with, and not subordinate to, that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of state constitutions and statutes. Such established rules are always regarded by the federal courts. no less than by the state courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled it is the right and duty of the federal courts to exercise their own judgment; as they also always do in reference to the doctrines of commercial law and general jurisprudence. So when contracts

and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision, of the state tribunal, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may adopted by the state courts after such rights have accrued. But, even in such cases, for the sake of harmony and to avoid confusion, the federal courts will lean towards an agreement of views with the state courts if the question seems to them balanced with doubt. Acting on these principles, founded, as they are, on comity and good sense, the courts of the United States. without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the state courts. As, however, the very object of giving to the national courts jurisdiction to administer the laws of the states in controversies between citizens of different states was to institute independent tribunals, which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudications."

To the same effect are:

Pease v. Peck, 18 How. 595;

Snare & Triest Co. v. Friedman, 169 Fed. 1;

Kuhn v. Fairmont Coal Co., 215 U. S. 349; 54
L. Ed. 228.

From the foregoing authorities, the principle seems firmly established that where the law of a particular state construing a particular statute is either unsettled or has not been construed by state decisions, then in either of such events the federal courts

"properly claim the right to adopt their own interpretation of the law applicable to the case."

(Burgess v. Seligman, supra.)

#### IV.

### FEDERAL DECISIONS ON SUBJECT MATTER OF THE NATURE OF A WIFE'S INTEREST IN COMMUNITY PROPERTY.

Since the amendments of 1917, the community property laws of the State of California have been substantially identical with those in existence in the other seven community property states. As a matter of fact, in some respects the community property laws of California accord to the wife greater rights than those to which she is privileged in the other community states. In addition thereto, it is to be borne in mind that since the 1923 amendments to Sections 1401 and 1402 of the Civil Code of the State of California, by virtue of which the wife was granted the right of testamentary disposition as to her onehalf of the community property, it can truthfully be said that no community property state in this country gives to the wife any greater substantive rights than does California, and in many instances the rights of a wife in the other community property states fall far short of those which the wife now has in California.

In an appendix which is attached to this brief, there is set forth a comparative table of the present community property laws of California and those of a number of other community property states, and the attention of the court is carnestly directed to the striking similarity between these various laws. It is true that the language of the various statutes of community property states other than California, is not a verbatim reproduction of the California statutes, but we challenge counsel for the Government to point out what, if any, substantive rights to be found in other community property states are not to be found in the California statutes.

It therefore becomes pertinent to inquire as to the federal decisions upon the subject matter of the nature of the wife's interest in community property.

This court, in two carefully considered cases involving community property statutes practically identical with those existing in California since the amendments of 1917, has unmistakably announced the rule that the one-half interest of a wife in the community property is a vested one.

Warburton v. White, 176 U. S. 484; Arnett v. Reade, 220 U. S. 311.

In the Warburton case, it is said:

"It is misconception of that system (community property system) to suppose that because power was vested in the husband to dispose of the acquest during marriage as if it were his own, therefore by law the community property belonged solely to the husband."

Again in the Arnett case, this court declared:

"For if the wife had a mere possibility, it would seem that whatever went to the husband from her so-called half would not descend from

her, but merely would continue his. The statement also directly contradicts the conception of the community system expressed in Warburton v. White, 176 U. S. 484, 494; 44 L. Ed. 555, 559; 20 Sup. Ct. Rep. 404, that the control was given to the husband, 'not because he was the exclusive owner, but because by law he was created the agent of the community'.

It is not necessary to go very deeply into the precise nature of the wife's interest during mar-The discussion has fed the flame of judicial controversy for many years. The notion that the husband is the true owner is said to represent the tendency of the French customs (2 Brissaud, Hist. de Droit Franc. 1699, n. 1). The notion may have been helped by the subjection of the woman to marital power (6 Laferriere, Hist. du Droit Franc. 365; Schmidt, Civil Law of Spain and Mexico, arts. 40, 51), and in this country by confusion between the practical effect of the husband's power and its legal ground, if not by mistranslation of ambiguous words like domino. See United States v. Castillero, 2 Black 17, 227; 17 L. Ed. 360, 400. However this may be, it is very plain that the wife has a greater interest than the mere possibility of an expectant heir. For it is conceded by the court below and everywhere, we believe, that in one way or another she has a remedy for an alienation made in fraud of her by her husband. (Novisima Recopilacion. Bk. 10, Title 4, Law 5; Schmidt, Civil Law of Spain and Mexico, art. 51; Garrozi v. Dastas. 204 U. S. 64, 78; 51 L. Ed. 369, 378; 27 Sup. Ct. Rep. 224.)"

We finally come to the case of Blum v. Wardell, which involved a situation very similar to the point at issue herein.

In that case the sole question presented for adjudication was:

Is the one-half interest of a surviving wife in the community property of herself and her deceased husband, where both husband and wife are domiciled in California, subject to the federal estate tax upon the death of the husband?

It is important to note that the deceased husband in the *Blum* case died domiciled in California shortly after the community property enactments of the California legislature of 1917, and the question there involved was one of first impression. Suit was filed, in the original instance, in the United States District Court at San Francisco and judgment was given by the trial court in favor of the taxpayers and against the Government. (270 Fed. 309.)

The learned trial judge in rendering judgment for the taxpayers, handed down a written opinion and, after reviewing the statutory law as to community property, beginning with the first law of 1850, and the subsequent changes made up to and including the legislative enactments of 1917, said:

"The plaintiffs contend that this legislation necessarily changes the rule of decision in the State of California, assuming that a fixed or established rule can be gathered from the decided cases. This contention must be upheld. The amendment to the inheritance tax law of the state is a legislative disapproval of the decision in the Moffitt case. The community property acquired before its passage (Arnett v. Reade, supra) and if that act does not recognize in the wife a valid, subsisting, vested interest and estate in the community property during the life of the husband, language is without meaning and legislation with-

out avail. When the husband had the management and control of the community property with the like absolute power of disposition as of his own separate estate, a decision that the wife had a mere expectancy was plausible, if unsound. But under these recent acts such a decision would be without excuse or jurisdiction. It is needless to encumber the record with citations from the Supreme Court of the United States and other community property states to demonstrate this. Nor have I overlooked the fact that there has been no change in the community property laws so far as concerns personal property. In all the community property states, from the necessity of the case, the agency of the husband as head of the family is much broader and his control and dominion over personal property much greater than in the case of real property, but it has never been supposed that this difference lessens the estate of the wife in community personal property, or calls for a different rule of succession.

"The claim of the Government is inequitable at best. It is conceded that the interest of the surviving wife in community property in other community property states is exempt from the estate tax under identical laws, and nothing short of some imperative controlling necessity would justify a court in upholding the tax in a single state. I find no such obstacle in the way of administering equal and impartial justice in this case, and the demurrer is overruled."

The Government took an appeal from the decision of the District Federal Court to the Circuit Court of Appeals for the ninth circuit and the judgment of the lower court was affirmed. (276 Fed. 226.)

The Solicitor General then filed a petition in the Supreme Court of the United States for a writ of certiorari; that petition was denied on March 6, 1922. (258 U. S. 617, 618.)

In the concluding portion of the majority opinion of the Circuit Court of Appeals, Mr. Justice Ross said:

"It must not be forgotten that the sole question here is one of federal inheritance tax and, even if the case was not controlled by the California statute of 1917 above referred to, applying to it the rule of law announced by the Supreme Court of the United States in the case of Arnett v. Reade, 220 U. S. 311, 320 \* \* \* the result, it seems to us, must be the same, for the court there said 'it is very plain that the wife has a greater interest than the mere possibility of an expectant heir.'"

The rule of law enunciated by the foregoing quotation applies with aptitude to the situation involved in the present case, for the sole question involved herein is one of "federal income tax" and it would be a stultification of the long established principles and rules laid down by this court in the cases of Warburton v. White and Arnett v. Reade, to hold that the interest of a wife in California in the marital community during coverture is like unto that of an expectant heir—and particularly in view of the action of the California legislature of 1917 in so changing its community property laws as to place them on a parity with the community property laws of other states. Whatever justification there might formerly have been for the specious reasoning contained in the decisions of the Supreme Court of California in denominating the interest of a wife to be that of an

"expectant heir", that justification has long since ceased.

#### V.

## ONE HALF OF INCOME FROM COMMUNITY PROPERTY IS TAXABLE TO THE WIFE AS OWNER THEREOF.

From the principles of law established by the foregoing federal decisions on the nature of a wife's interest in community property, it must be conceded that the interest of the wife in the common property during coverture is a "vested interest."

With this premise, we turn to the solution of the particular question involved on the appeal herein, viz.:

In what manner shall a husband and wife, domiciled in California, return, for income tax purposes, the income from the common property?

It is, of course, a fundamental principle that the income and accretions of property go to the owner. If the entire income is to be taxed to the husband, as claimed by the Government, such taxation necessarily assumes absolute ownership in the husband; otherwise it is indefensible from any viewpoint. We have created here the same situation as if the Government were to say to  $\Lambda$  and B, equal partners in a business venture that, because of the fact that  $\Lambda$  is the active partner who manages and controls the joint business enterprise, while B remains a passive partner in the sense that he merely contributed one-half of the capital—that A shall be taxed upon the entire gain of such a partnership venture. The mere statement of such a proposition is a refutation of its

soundness and it is difficult to perceive wherein the situation of a wife in California differs from that of B, the silent partner in the joint enterprise above referred to. In the one case, we have a so-called joint enterprise or partnership created by law—the community property system. In the other case, we have a joint enterprise created by contract of the parties. In either case, the results are identical and the principle applicable to the business partnership of  $\Lambda$  and B must, of necessity, control the community partnership created by law for a husband and wife.

It is a matter of common knowledge that in the states of the Union which have not the community property system, a recognized practice has grown up whereby a husband makes an equal division of his property with his wife, for the purpose of minimizing income taxes. Under such circumstances, the income tax law has not sought to tax nor could it tax, without violating constitutional inhibitions, the income of the wife, as a part of the income of the husband. community property states, such as California, the law itself accomplishes such a division of the common property, and were a husband in California to transfer to his wife as her separate property onehalf of the common property, the wife would still have her equal proprietary rights in the remaining one-half, and thus would, in reality, own three-fourths of the matrimonial gains and acquisitions.

It is of more than passing interest to note that there are eight so-called community property states in this country and that, at least since 1921, the Treasury Department has, by appropriate ruling, recognized the

right of a husband and wife in every community property state, other than California, to divide their community income, for income tax purposes, and this recognition by the Treasury Department has been given a retroactive effect to 1916, when the present series of income tax laws was first enacted. (T. D. 3138.)

Since the Revenue Act of 1916, various revisions have been made and so-called new revenue acts passed by Congress. In the course of these enactments and revisions, Congress must be deemed to have known of the interpretation placed by the Treasury Department upon the then existing and prior revenue acts, in so far as the taxability of income from community property is concerned. But we need not rely solely upon this constructive knowledge. It is a matter of public record that when the Revenue Act of 1921 was under consideration by Congress, preparatory to its final enactment, the Treasury Department sought to have written into the act a provision specifically taxing to the husband the entire income from community property in those states where the community property system prevailed. That effort failed of consummation.

In 1924 the present revenue act was passed and in Committee Print No. 1 of that act, Section 213(b), thereof the following proposed provision was contained:

"Income received by any marital community shall be included in the gross income of the spouse having the management and control of the community property and shall be taxed as the income of such spouse."

Thereafter during the course of the hearings before the Ways and Means Committee of the House of Representatives, lengthy arguments were presented by representatives of community property states—all to the effect that such a provision would be tantamount to taxing to one person, income from property belonging to another person. Elaborate briefs were filed and, after mature consideration, the above quoted provision was stricken from the Revenue Act of 1924, as finally passed.

No claim is made by us that the practice of the Treasury Department in permitting the division of community income between a husband and wife, for income tax purposes, in all community property states other than California, is of controlling force before this court. But it cannot be gainsaid that this practice, coming, as it did, after mature deliberation by the Treasury Department and based, as it was, upon the written opinions of two able Attorney Generals of the United States, is not of persuasive force.

Nor is it claimed by us that the legislative history of the revenue acts, with respect to the attempt to insert a specific provision taxing the entire income from the community property to the husband, is of controlling character upon this court. Here again it can only be said that there is presented evidence in concrete fashion of the interpretation placed upon the revenue act by Congress and that such interpretation evinced an intention not to tax the husband for more than one-half of the gains and profits from the marital community.

This court has but one question presented for solution, and that is whether, under the Revenue Act of 1918, an income tax is legally imposable upon the husband in respect to the entire income from the community property and, in arriving at a proper solution, there must be considered the language of the taxing act. As appears from the opening portions of this brief, the Revenue Act of 1918 levied a tax upon the "net income of every individual" and, as appears from Section 213 of the act, the income to be taxed had reference to the income accruing from the ownership of property.

If our premise be correct that the wife has, during coverture, a vested interest in the common property, then the conclusion would seem to be inevitable that her ownership in one-half of the common property was of such a nature, that she is the person who is not only entitled to return the income from her one-half thereof, but that she is the person who must so do.

Bearing in mind that the Revenue Act of 1918 is silent upon the question of income from community property and further bearing in mind the abortive, but unsuccessful legislative attempts made to tax the husband upon the entire income from the marital community, we have presented a situation where Congress has unmistakably spoken as to what was its intention with respect to the taxability of income from community property. That intention is entitled to be considered by this court under well established rules of statutory construction.

It is therefore respectfully submitted that the judgment of the lower court be affirmed and that there be granted to the wife in California the right to return, for income tax purposes, one-half of the income from the property of the marital community.

Dated, San Francisco, September 26, 1925.

Respectfully submitted,

JOHN C. ALTMAN,

RICHARD S. GOLDMAN,

Amici Curiae.

(APPENDIX FOLLOWS.)



**APPENDIX** 

#### APPENDIX

#### COMPARATIVE TABLE OF COMMUNITY PROPERTY LAWS

CALIFORNIA.

Section 164 Civil (1) Code: "Community property: Conveyances by Married Woman; Limitations. All other property acquired after marriage by either husband or wife, or both, including real property situated in this state. and personal property wherever situated, heretofore or hereafter, acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this state, is community property: but wherever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property. And in the case the conveyance is to such married woman and to her husband, or to her and any other person, the presumption is that the married woman takes the part conveyed to her, as tenant in common, unless a different intention is expressed in the instrument. and the presumption in this section mentioned is conclusive in favor of a purchaser or encumbrancer in good faith and for a valuable consideration.

(2) Section 172, Civil Code: "Management, control and disposition of community Personal Property. The husband has NEVADA.

(1) Sect. 2156 "All other property acquired, after marriage by either husband or wife, or both, except as provided in Sec. 14 and 15 in this act, is community property."

New Mexico.

Laws of New Me ico, 1907, Chap. 37, S 10. "Community proper -Conveyances by Marri Women — Limitations All other property quired after marriage either husband or wife. both, is community pro erty; but whenever a property is conveyed to married woman by an strument in writing, t presumption is that ti is thereby vested in her her separate proper And if the conveyance to such married wom and to her husband, or her and any other perso the presumption is th the married woman tal the part conveyed to he as tenant in common u less a different intenti is expressed in the instr ment, and the presum tion in this section me tioned is conclusive favor of a purchaser encumbrancer in goo faith and for a valual consideration. \*\*

- (2) Sect. 2160. "The husband has the entire management and control of the community property, with the like power
- (2) Sec. 16 of Cha
   37 (Laws of 1907) amen
   ed in 1915, Laws of
   M. 1915, Chap. 82, pa
   123. "The husband h

#### ARIZONA.

(1) Section 3850, Statutes 1921. "All property acquired by either husband or wife during the marriage, exeept that which is acquired by gift, devise or descent or earned by the wife and her minor children while she has lived or may live separate and apart from husband shall be deemed the common property of the husband and wife,

#### WASHINGTON.

(1) Section 1433, Pierce's Code 1921. "Property not acquired or owned as prescribed in Sections 2400 and 2408, acquired after marriage by either husband or wife or both, is community property. The husband shall have the management and control of community personal property with a like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof."

- (2) and during coverture personal property may be disposed of by the husband only; but the husband and wife must
- (2) Section 1434, Pierce's Code 1921. "The husband has the management and control of the community real property

CALIFORNIA (cont'd).

the management and control of the community personal property with like absolute power of disposition, other than testamentary as he has of his separate estate; provided, however, that he can not make a gift of such community personal property, or dispose of the same without a valuable consideration, or sell, convey, or encumber the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the wife or minor children that is community, without the written consent of the wife."

Management of "172a. Community Real Property. The husband has the management and control of the community real property but the wife must join with him in executing any instrument by community which such real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered; provided, that nothing however herein contained shall be construed to apply to a lease, mortgage, conveyance, or transfer of real property or of any interest in real property between husband and wife; provided also, however, that the sole lease, contract, mortgage or deed of the husband, holding the record title to community real property, to a lessee purchaser or encumbrancer, in good faith without knowledge of the

NEVADA (cont'd).

absolute disposition of thereof, except as hereinafter provided, as of his own separate estate; provided, that no deed of conveyance, or mortgage of a homestead as now defined by law regardless of declaration whether a thereof has been filed or not, shall be valid for any purpose whatever unless both the husband and wife execute and acknowledge the same as now provided by law for the conveyance of real estate; provided further that the wife shall have the entire management and control of the earnings and accumulations of herself and her minor children living with her, with the like absolute power of disposition thereof, when said earnings and accumulations are used for the care and maintenance of the family."

New Mexico (cont'd)

the management and co trol of the personal pro erty, of the communiother than testamentary he has of his separate tate; but the husband a wife must join in all dee and mortgages affecti real estate, provided, th neither husband or w may convey or mortga separate property without the other joining in su conveyance or mortgag provided. furth that any transfer or e veyance attempted to made of the real proper of the community either husband or w alone shall be void and no effect."

ARIZONA (cont'd).

join in all deeds and mortgages affecting real estate except unpatented mining claims, which may be conveyed by the husband or wife only, as provided by the laws of this state relating to conveyances; provided that either husband or wife may convey or mortgage separate property without joining in such conveyance or mortgage." WASHINGTON (cont'd).

but he shall not sell, convey or encumber the community real estate unless the wife join with him in executing the deed or other instrument of conveyance by which the real estate is sold, conveyed or encumbered and such deed or other instrument of eonveyance must be acknowledged by him and his wife.

marriage relation shall be presumed to be valid; but no action to avoid such instrument shall be commenced after the expiration of one year from the filing for record of such instrument in the recorder's office in the county in which the land is situate."

(3) "1401. Upon the death of either husband or wife, one-half of the community property belongs to the surviving spouse; the other half is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse, subject to the provisions of section one thousand four hundred two of this code.

NEVADA (cont'd).

New Mexico (cont'd).

(3) Sect. 2164. "Upon the death of the wife the entire community property belongs without administration to the surviving husband, except that in case the husband shall have abandoned his wife and lived separate and apart from her without such cause as would have entitled him to a divorce, the half of the community property subject to the payment of its equal share of the debts chargeable to the estate owned in community by the husband and wife, is at her testamentary disposition in the same manner as her separate property, and in the absence of such disposition goes to her descendants equally, if such descendants are in the same degree of kindred to the decedent; otherwise, according to the right of representation; and in the absence of both such disposition and such descendants.

goes to her other heirs at law, exclusive of her hus-

band."

Sec. 26. "Dist (3)bution of the Comm Property on Death Wife.—Upon the death the wife the entire co munity property with administration belongs the surviving husband, cept such portion there as may have been apart to her by a judic decree, for her supp and maintenance, wh portion is subject to l testamentary disposit and in the absence of st disposition goes to her scendants, or heirs, exc sive of her husband."

Washington (cont'd).

- (3)Section 1100, Statutes 1921, "Upon the death of the husband onehalf of the community property shall go to the surviving wife and the other one-half is subject to the testamentary disposition of the husband, and in the absence of such disposition goes to his descendants equally, if such descendants are of the same degree of kindred to the decendent, otherwise, according to the right of representation; and in the absence of both such distribution and such descendants, goes to the surviving wife. Upon the death of the wife one-half of the community property shall go to the surviving husband and the other half is subject to the testamentary disposition of the wife, and in the absence of such disposition goes to her descendants equally, if such descendants are of the same degree of kindred to the decedent. otherwise according to the right of representation; and in the absence of both such distribution and such descendants goes to the surviving husband."
- (3) Section 1435, Pierce's Code 1921. "Upon the death of either husband or wife, one-half of the community property shall go to the survivor subject to the community debts, and the other one-half shall be subject to the testamentary disposition of the deceased husband or wife, subject also to the community debts."

CALIFORNIA (cont'd).

(3) "1402. Community property passing from the control of the husband, either by reason of his death or by virtue of testamentary disposition by the wife, is subject to administration, his debts, family allowance and the charges and expenses of administration; but in the event of such testamentary disposition by the wife, the husband, pending administration, shall retain the same power to sell, manage, and deal with the community personal property as he had in her lifetime; and his possession and control of the community property shall not be transferred to the personal representative of the wife except to the extent necessary to carry her will into effect. After forty days from the death of the wife, the surviving husband shall have full power to sell, lease, mortgage or otherwise deal with and dispose of the community real property, unless a notice is recorded in the county in which the property is situated to the effect that an interest in the property, specifying it, is claimed by another under the wife's will.".

NEVADA (cont'd).

(3) Sect. 2165, "Upon the death of the husband one-half of the community property goes to the surviving wife, and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition goes to the surviving children equally, and in the absence of both such disposition and surviving children, the entire community property belongs without administration to the surviving wife, except as hereinafter provided, subject, however, to all debts contracted by the husband during his life that were not barred by the statute of limitations at the time of his death; provided, however, that the homestead set apart by the husband and wife, or either of them, before his death, and such other property as may be exempt from execution or forced sale, shall be set apart for the use of the widow and minor heirs, and if no minor heirs, for the use of the widow.'

New Mexico (cont'd).

(3) Sec. 27. "Distribution of Common Property on Death of Husband.-Upon the death of the husband, one-half of the community property goes to the surviving wife, and the other half is subject to the testamentary disposition of the husband. and in the absence of such disposition goes one-fourth to the surviving wife and the remainder in equal shares to the children of the decedent and further as provided by law. In the case of the dissolution of the community by the death of the husband the entire community property is equally subject to his debts, the family allowance and the charge and expenses of administration."

Washington (cont'd).

Section 1436, Pierce's Code 1921. "In case no testamentary disposition shall have been made by the deceased husband or wife of his or her half of the community property, it shall descend equally to the legitimate issue of his, her or their bodies. If there be no issue of said deceased living or none of their representatives living, then the said community property shall all pass to the survivor to the exclusion of collateral heirs, subject to the community debts, the family allowance and charges and expenses of administration."



OCT 5 1925

WM. R. STANSBURY

# In the Supreme Court

OF THE

## United States

October Term, 1925

No. 1249 493

THE UNITED STATES OF AMERICA,

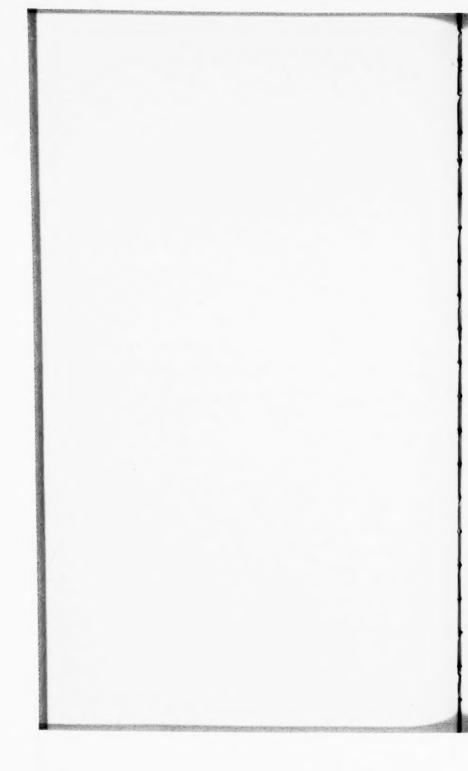
Plaintiff in Error,

VS.

R. D. Robbins, Jr., et al., Executors,  $Defendants\ in\ Error.$ 

#### BRIEF OF ALLEN G. WRIGHT, AMICUS CURIAE.

ALLEN G. WRIGHT,
Mills Building, San Francisco,
Amicus Curiae.



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# In the Supreme Court

OF THE

## United States

OCTOBER TERM, 1925

No. 1249

THE UNITED STATES OF AMERICA,

Plaintiff in Error.

VS.

R. D. Robbins, Jr., et al., Executors,

Defendants in Error.

#### BRIEF OF ALLEN G. WRIGHT, AMICUS CURIAE.

This brief is filed herein by Allen G. Wright as amicus curiae pursuant to permission of the court first had and obtained. As counsel for the San Francisco Chamber of Commerce, at whose request this brief has been prepared, he proposes in this brief to support the interests of the many taxpayer members of that Chamber who are concerned with the general issues raised in the above entitled action, which is now at the bar of this court as a test case.

It is probably in order first to indicate the history of those general issues. They concern the rights of husbands and wives, domiciled in California, to return one-half of their total community income as the income of husband and wife, respectively, for all purposes of the federal income tax thereon.

#### T.

#### HISTORY OF COMMUNITY INCOME TAX ISSUES.

In 1920, pursuant to an opinion of Attorney General Palmer of August 24, 1920, the Treasury Department published a decision (T. D. 3071) in which it was determined that the earnings of husband and wife domiciled in Texas are community income, and that such husband and wife in rendering separate income tax returns may each report as gross income one-half the total earnings of the husband and wife. On March 3, 1921, pursuant to an opinion of Attorney General Palmer of February 26, 1921, the Treasury Department published a second decision (T. D. 3138) whereby the same right to divide community income for the purpose of federal income taxes thereon, previously granted to husbands and wives domiciled in Texas. was extended to husbands and wives domiciled in all the other community property states, except California, and such a right was therein specifically denied to Californians.

The Treasury Department ruled against Californians as it did in T. D. 3138 on the asserted ground that "in all of the community property states except California their own courts have held that the wife has, during the existence of the marriage relation, a vested interest in one-half of the community property" (T. D. 3138 as reported in Treas. Dept. Cumu-

lative Bulletin No. 4 Jan.-June 1921, p. 250) and on the asserted ground that "while the statutes of California are in some respects similar to the community property laws of the other community property states. the rule established by the highest courts of that State is that during coverture the wife has no vested interest in the community property, her interest therein being a mere expectancy" (Ibid. p. 249), utterly ignoring the effect on the case of Sections 161 and 682 of the California Civil Code and that line of cases commencing with Beard v. Knox, 5 Cal. 252, and ending with Taylor v. Taylor, 192 Cal. 71, later collected and commented upon in the opinion of Attorney General Daugherty published in T. D. 3569 (Treas. Dept. Cumulative Bulletin III—1 Jan.-June 1924, p. 91), all recognizing that the wife in California has a present vested estate in the community property during coverture.

The position of the Government, as revealed in T. D. 3138, is very frankly that married taxpayers in California were not entitled to the same rights as married taxpayers in the other community property states because, as the Government understood the case, in the other seven community property states the wife, during coverture had a vested estate in community property while in California, as the Government understood, the wife had merely the expectancy of an heir in such property.

The new states accorded the right of division of community income by T. D. 3138 were Arizona, Idaho, Louisiana, Nevada, New Mexico and Washington. By the same decision it was also determined that in these

states there should, for the purpose of the federal estate tax, be included in the gross estate one-half only of the community property of the husband and wife domiciled therein. In reaching this decision, so far as it was adverse to California, the Attorney General and the Treasury Department declined to be guided or controlled by the contrary decision of the United States District Court, Southern Division, Northern District of California, so far as Californians were affected, in Blum v. Wardell, 270 Fed. 309, which had been given on December 30th, 1920, and was later on October 24, 1921 (after the publication of T. D. 3138) affirmed by the Circuit Court of Appeals for the Ninth Circuit. (276 Fed. 226.) Had the Treasury Department accepted the decision of the United States District Court in Blum v. Wardell, and all its implications, the husbands and wives domiciled in California would have been accorded the same rights by T. D. 3138 as the husbands and wives domiciled in the other community property states, both as to income and estate taxes.

The Government, however, was not willing, even later on, to accept the decision of the Circuit Court of Appeals in *Blum v. Wardell*, affirming the decision of the district court, and the Government accordingly applied to the Supreme Court for a writ of certiorari which was denied by that court on March 6, 1922. (258 U. S. 617.) On April 7, 1922, the Government, ealling to the attention of the Supreme Court the case of *Roberts v. Wehmeyer*, which had been decided by the California District Court of Appeal on November 21, 1921, and was then pending for hearing before the

California Supreme Court, moved to revoke the order of the Supreme Court of the United States denying the petition for a writ of certiorari in the case of Blum v. Wardell, claiming that the decision of the California court in Roberts v. Wehmeyer might control the action of the Government in the collection of internal revenue in all future cases. Roberts v. Wehmeyer was decided by the California Supreme Court on August 17, 1923, and a re-hearing therein was refused September 13, 1923. (191 Cal. 601, 218 Pac. 22.) Following this, some time in October, 1923, the Supreme Court of the United States with the consent of the Solicitor General denied the motion of the Government to revoke the order denying certiorari in the case of Blum v. Wardell.

After the case of Blum v. Wardell had been thus finally disposed of, the Government for a time continued to tax the community income and the community estates of husbands and wives domiciled in California as though it were a common law instead of a community property law state. The Secretary of the Treasury subsequently referred the matter to the Attorney General for an opinion, and on March 26, 1924, by T. D. 3568, California was added by the Treasury Department to the states named in and governed by T. D. 3138 and accorded similar rights as to both federal income and federal estates taxes, pursuant to an opinion of Attorney General Daugherty of March 8, 1924 (published in T. D. 3569), holding in effect that husbands and wives domiciled in California had the same rights and were entitled to the same treatment so far as federal taxes were concerned as husbands and wives domiciled in the other community property states. On May 27, Attorney General Stone, now Mr. Justice Stone of this court, at the request of the Secretary of the Treasury, withdrew the opinion of Attorney General Daugherty for further consideration; and the Treasury Department by T. D. 3596. issued May 31, 1924, determined that the auditing and closing upon a community property basis of both income and estate tax cases arising in California be held in abevance pending further consideration of the matter by the Attorney General. An opinion was in due course given on this subject by Attorney General Stone, under date of October 9, 1924, which was later made public by the Treasury Department on January This release of that opinion in January, 27, 1925. 1925, was followed by T. D. 3670, under date of February 7, 1925, providing, pursuant to that opinion, that, in computing the gross estate of a deceased spouse for the purposes of the federal estate tax, there should be included but one-half of the value of the community property acquired under the laws of the State of California and expressly stating further that the two opinions of the Attorney General of March 8, 1924, and October 9, 1924, were limited to federal estate taxes and had no application to federal income This present action concerns federal income taxes on community income in California and is the outcome of T. D. 3670. This action has been accepted by the Government as a test case to determine the legal issues involved herein.

In the meantime two efforts had been made by the Treasury Department to secure changes in the federal income tax laws, upon those subject matters, once in 1921, and again in 1924. Of those changes so suggested Attorney General Stone in his opinion of October 9, 1924, wrote as follows:

"While the Act of 1921 was under consideration I am informed that officials of the Treasury attempted to have a provision inserted making community property a part of the gross estate. The Ways and Means Committee refused to accept this proposed amendment. In the bill which was prepared in the Treasury Department and which as amended became the Act of 1924, there was a provision requiring so-called Joint Income of husband and wife under the Community Property law of California to be returned, for purposes of taxation, as a single income of the husband.

"After hearings before the Ways and Means Committee and the submission of extensive briefs in opposition to the proposal, the Committee struck from the Bill the provision for taxing community income as single income and the bill, as enacted, did not set aside or modify the application of the legal rule laid down in Blum v. Wardell. Notwithstanding the fact that there have been two general revisions of the Revenue Act and the question involved in the decision of Blum v. Wardell has been distinctly presented to the legislative branch of the Government, the principle of that decision has been left undisturbed by Congress."

In this opinion, just quoted, the Attorney General inadvertently referred to the clause rejected in 1924 as though it concerned California alone. This proposed but rejected clause would have affected every community property state. It read as follows:

"Income received by any marital community shall be included in the gross income of the spouse

having the management and control of the community property and shall be taxed as the income of that spouse".

(Revenue Revision 1924—Hearings before the Committee on Ways and Means, House of Representatives—p. 349.)

The judicial, the administrative and the legislative history of the issues presented in the instant case has been as above outlined. The active participation of the San Francisco Chamber of Commerce in the making of that history makes it appropriate that it be heard herein through its counsel as amicus curiae.

#### II.

#### THE ISSUES IN THIS CASE.

The precise question to be settled in this action, the same being a test case, concerns the rights of husbands and wives domiciled in California to render separate income tax returns and to report therein respectively as gross income one-half of the community income. If such a right be recognized by this court, the judgment herein of the lower court must be affirmed. Such a right has been recognized by the Treasury Department as the right respectively of husbands and wives domiciled in the seven other community property states. (T. D. 3071 and 3138.) The reason assigned by the Treasury Department for denying in California what was accorded in the other seven community property states was that in the latter the wife had a vested interest in the community property during

coverture and that in California, as the Government understood the law, the wife during coverture had no such vested interest in the community property, but had only a mere expectancy.

In attempting to decide questions of law where the community property interests of husband and wife were involved the California courts unfortunately have not been logically consistent. One line of the California cases, like that of Roberts v. Wehmeyer, 191 Cal. 601, and the cases therein cited, refers to the interest of the wife in community property during coverture, prior to the amendments of 1917, as a mere expectancy like that of an heir and declares that during coverture the wife had no estate or vested interest in the community property. Another line of California cases, like that of Taylor v. Taylor, 192 Cal. 71, and the cases therein cited, recognizes in the wife during coverture an estate or interest in the community property prior to the amendments of 1917. Referring to this conflict, Attorney General Stone in his opinion said, "I leave it to others to reconcile the decisions in these cases", and Attorney General Daugherty in his opinion declared, "In fact, I am of the opinion no established rule can be gathered from the decided cases in that state". Attorney General Palmer in his earlier opinion of February 26, 1921, singled California out of the other community property states for exceptional treatment on the assumption that "the California courts have held that, under the law as it stood prior to 1917, the wife had no vested interest in community property prior to the dissolution of the marriage".

The issues of this case concerning married taxpayers in California may thus appear to revolve around the matter of an estate during coverture in the wife in the community property, if not before 1917, then after the California statutory amendments of 1917.

In our view, however, it is not essential to determine whether in California the "community interest" of the wife in community property during coverture now amounts, or prior to 1917 amounted, to what "the common law" would recognize as a "present interest" or a "vested estate". That she has had and has equally with her husband a "community interest" in the community property is and ever since 1872 has been recognized by the express provisions of Sections 161 and 682 of the California Civil Code.

"A husband and wife may hold property as joint tenants, tenants in common, or as community property."

(California Civil Code 161.)

"The ownership of property by several persons is either:

1. Of joint interests;

Of partnership interests;
 Of interests in common;

4. Of community interest of husband and wife."

(California Civil Code 682.)

The California Code has thus not only named those usual interests in property known to the common law, but has added one unknown to the common law, the "community interest" of husband and wife. Those "community interests" are not only new but

they represent a concept unknown to the common law. Being *sui generis* the incidents of such "community interests" are peculiar to those interests and cannot, with any degree of precision, be likened unto the incidents of those estates known to the common law.

The important question, in our view, is therefore whether the incidents of the wife's "community interest" and of the husband's relative interest are not substantially similar in California and in the other community property states. If that "community interest" of the wife is in its incidents substantially similar in all the community property states the substance of the interest is not materially affected, because in one state it is labeled or likened to a common law vested estate and in another state this likeness is sometimes questioned. It is the substance of that "community interest" of both husband and wife that is the object and the only proper object of federal taxation. (Eisner v. Macomber, 252 U. S. 189; Weiss v. Stearn, 265 U. S. 253.)

The position which we take is that in determining what interests may be taxed under authority of a federal law it is not the common law term by which those interests may or may not have been identified by the California decisions which should be controlling but rather the substance of those interests. California, as to the "community interests" of husband and wife, cannot be fairly distinguished from the other community property states for the simple reason that the community property system in California is substantially the same as that of the other community

property states. This brief will be primarily addressed to the establishment of that proposition.

For the purposes of this brief, we shall, in the beginning, assume that T. D. 3071 and 3138 correctly construe the income tax laws so far as the other seven community property states are concerned.

#### Ш.

THE CONDITIONS OF THE COMMUNITY PROPERTY SYSTEM IN CALIFORNIA, IN MATTERS OF THE SUBSTANTIVE RIGHTS OF BOTH SPOUSES, ARE SO SIMILAR TO THE CONDITIONS IN THE OTHER SEVEN COMMUNITY PROPERTY STATES THAT THE REGULATIONS WHICH GOVERN THE FEDERAL TAXATION OF INCOME IN THOSE STATES SHOULD APPLY, TOO, IN CALIFORNIA.

 General Similarity As To the Character of Community Property.

Ever since 1850 community property has been defined in California as "all property acquired after the marriage by either husband or wife, except such as may be acquired by gift, bequest, devise or descent." (Statutes 1850, page 254, California Civil Code, Sections 162, 163 and 164.) It is usual in the community property states to define the separate property of the spouses as that acquired by them before marriage and that acquired afterwards by gift, bequest, devise or descent, and to define as community property all other property acquired by either husband or wife during the marriage. (31 C. J. pp. 20, 22, 26.) It is generally recognized, too, that the earnings of the husband and of the wife, during the marriage, belong to the community and are community property. (C. J.

p. 27.) It is plain that in the very definition of community property, such as obtains in California, the earnings of both husband and wife would be community property, unless, as in the special case of the wife living separate and apart (California Civil Code, Section 169) the wife's earnings were expressly excepted by statute from the general rule, and the decisions of the California courts hold accordingly. (Washburn v. Washburn, 9 Cal. 475; Martin v. Southern Pacific Company, 130 Cal. 285; Fennell v. Drinkhouse, 131 Cal. 447.) These general characteristics of community property, common to all the community property states, including California, are recognized in the series of opinions on this subject issued from the Attorney General's office, as published in Treasury Decisions 3071, 3138 and 3569, and will appear from a comparison of the California statutes on the subject, above referred to, with the corresponding statutes of the other community property states. In New Mexico and Nevada the statutes defining separate and community property are almost literal copies of the California statutes. (Sections 2757. 2758, 2764 New Mexico Code 1915; Sections 2155. 2156 Revised Laws of Nevada 1912; Sections 162, 163 and 164 California Civil Code.)

#### Variety in Community Property States Concerning Status of Wife's Earnings and Income From Separate Property.

Some variety is introduced into the subject of what is community property by the provisions in some states making the income from the separate property of the spouses community property. Thus in Idaho the rents and profits of the separate property of husband and wife are community property. (Section 4660 Compiled Stat. Idaho 1919.) So in Louisiana the income of separate property may become community property (Article 2402 Rev. Civil Code Louisiana), and in Texas income from separate property is community property, except that, since 1917, the rents from separate real property are the separate property of the owner of the land. (Section 4621 Vernon's Sayle's, Texas Civ. and Crim. Stats. 1922 Supp; Barr v. Simpson, 117 S. W. 1040; Hayden v. McMillan, 23 S. W. In the other five community property states income from the separate property of either spouse, as in California, is not community property. (Section 3848 Civil Code Arizona; Sections 162, 163 Civil Code California; Sections 2757, 2758 New Mexico Code of 1915; Section 2155 Rev. Laws of Nevada; Sections 6890, 6891 and 6892 Remington's Comp. Stats. Washington, 1922.)

Some further variety is introduced into the community property system by the provisions on the subject of the wife's earnings. Thus in Arizona (Section 3850 Civil Code of Arizona), as in California (Section 169 Civil Code of California), the earnings of a wife living separate and apart from her husband are her separate property. In Texas the personal earnings of the wife are under the control, management and disposition of the wife alone and they are not subject to the payment of debts contracted by the husband. (Sections 4621, 4622 Vernon's Sayle's Texas Civil Stats. 1914 and Supp. 1922.) And in Washington the wages of her personal labor are the separate property of the wife. (Section 6895 Rem-

ington's Comp. Statutes of Washington 1922.) But, otherwise than as above noted, the earnings of the husband and of the wife in community property states are equally community property, though in Nevada the wife has the disposition of her earnings if used for the care and maintenance of the family (Section 2160 Rev. Laws of Nevada as amended in 1917), and in Idaho the wife, since 1915, has had the management and control of her personal earnings. (Sections 4666, 4667 Comp. Stats. Idaho 1919.)

The case where a wife is in receipt of personal earnings is an unusual circumstance in marital communities. So also the case where the wife has separate income producing property is the exception rather than the rule. There is some variety among the community property states in the status of such earnings and such separate property income as has been noted but this variety is not uniform throughout all the states. The total income from such sources, furthermore, bulks very small when compared to the aggregate community income in the eight community property states. Some variety concerning such relatively small matters does not materially disturb the substantial identity of the community property system in all eight community property states.

In the discussion which follows concerning the dominion of the husband over community property, we shall not stop to note the exceptions to general rules arising from the variety introduced into the subject by these special provisions concerning the wife's earnings and the income from the wife's separate property where such income is community property,

for these matters are relatively unimportant and in that field we find exception on exception. Thus in Idaho (Section 4666 Comp. Stats. Idaho 1919) where income from the wife's separate property is made community property, and where her earnings are community property, these particular forms of community income do not come under the general dominion of the husband. In Louisiana, on the other hand, the oldest of the community property states, where the wife's earnings are community income, the husband has the management, control and disposition thereof. (Article 2404 Revised Civil Code of La.) The statutes affecting the husband's dominion over community property and the exceptions to this control in some states in the case of the wife's earnings and of the income from her separate estate are set forth in Appendix A of this brief. In the further discussion these comparatively unimportant and diversified variations will be no longer considered.

### 3. Dominion of Husband Over Community Property in California.

It has been usual in the community property states to give to the husband a liberal dominion over the community property, but on this subject the statutes of the different states have from time to time varied somewhat.

In California from 1850 to 1891 the husband had "the management and control of the community property, with the like absolute power of disposition (other than testamentary) as he has of his separate estate" (California Stats. 1850, p. 254, Stats. 1861, p. 310, Stats. 1863-4, p. 363, Section 172 California Civil Code

as originally adopted in 1872), which section then read as above quoted. California courts, prior to 1891, held that the husband, however, could not voluntarily alienate the community property for the mere purpose of divesting the wife of her claims to it. (Smith v. Smith, 12 Cal. 216, 226; De Godey v. Godey, 39 Cal. 157, 161.) In 1891 began a series of statutory changes in California designed to protect more completely the community interest of the wife, during coverture, in the community property.

Since 1891 (California Statutes 1891, p. 425) the husband has been without power to make a gift of the community property or to convey the same without a valuable consideration, unless the wife in writing consented thereto. In *Dargie v. Patterson*, 176 Cal. 714, the Supreme Court recognized that this veto on gifts was conferred upon the wife "as a means of protecting her interest in the community property." (P. 718.)

This community interest of the wife in the community property, thus protected, is not a common law tenancy by entirety, as such an interest in property is not recognized in California. (Swan v. Walden, 156 Cal. 195.) The community interest of the wife so protected, as held in Dargie v. Patterson, supra, "goes to every part and parcel of the community estate." (P. 720.) It is a right, under this decision, to "an undivided one-half interest in every item of property." (P. 720.)

Since 1901 (California Stats. 1901, p. 598) the husband has been without power to convey or encumber the furniture, furnishings and fittings of the home,

or the clothing and wearing apparel of the wife or minor children, which was community property, even for a valuable consideration, without the written consent of the wife. Since 1913 (California Stats. 1913, p. 537) no assignment of the wages or salary of a married person is valid unless the written consent of the husband or wife of the person making the assignment is attached thereto. Since 1917 (California Stats. 1917, p. 829) the wife must join with the husband in executing any instrument by which community real property or any interest therein is leased for a longer period than one year or is sold, conveyed, or encumbered. Thus in California since 1891 the dominion of the husband over the community property, during the marriage, has been increasingly limited.

Since 1891 the dominion of the husband in California over all community property during coverture has been no broader than it is in some of the other community property states. It has been growing less and less broad ever since, and, subsequent to 1917, it is less broad than in any other community property state, as will appear from the discussion which follows.

# 4. Dominion of the Husband Over Community Personalty In California and the Other Community Property States.

In every one of the community property states the husband, during the marriage, is given the management of the community personalty and may transfer it, in any event, for a valuable consideration without the wife's consent. (Section 3850 Civil Code of Arizona; Section 172 Civil Code of California; Section 4666 Compiled Statutes of Idaho, 1919; Article 2404

Revised Civil Code of Louisiana; Section 2160 Revised Laws of Nevada; Section 2766, New Mexico Code of 1915 as amended by Laws of New Mexico, 1915, Chap. 84; Section 4622 Vernon's Sayle's Texas Civil Stat. 1914, Section 6892 Remington's Comp. Statutes of Washington, 1922.)

In California the husband since 1891 has not had the power to make a gift of community personalty or dispose of the same without a valuable consideration unless the wife consented thereto in writing (California Civil Code 172 as amended, California Stats. 1891, p. 425), and since 1901 he has not been permitted to transfer certain personal property, even for a valuable consideration, without the wife's written consent (California Civil Code, Section 172, as amended California Stats. 1901, p. 598), and since 1913 he has not been permitted to assign his wages or salary, which are community property in California, without the wife's written consent. (California Stat. 1913, p. 537.) Even prior to 1891 and at any time since 1850 the husband in California could not make a valid gift or transfer of community personalty in fraud of the wife's rights. His statutory power of disposition of community personalty during coverture from 1850 to 1891 was no broader than in Arizona, Idaho, Nevada, New Mexico after 1915, Texas, and Washington. (See Appendix A of this brief.) After 1891 the dominion of the California husband over community personalty was less broad than in these states. Prior to 1891, in California, a gift of community property by a husband to his mother, when reasonable in amount, was valid in the absence of a fraudulent intent to defeat

the claims of the wife in the community property. (Lord v. Hough, 43 Cal. 581.) On the same principle a gift of such property to children, in California prior to 1891, was valid under like circumstances. (Jacobs v. All Persons, 12 Cal. App. 163, 106 Pac. 896.) So in Nevada a gift of community property by the husband to trustees for the use of the people of a certain city was valid without the wife's consent thereto where the property so given in proportion to the whole estate was not unreasonable or indicative of a fraudulent intent to defeat the wife's claims. (Nixon v. Brown, 214 Pac. 524.) But since 1891 such gifts in California have been barred, except where the wife consented thereto in writing. Since 1891 the husband in California has been without the power to make a valid gift of community property, real or personal, for the establishment of the children of the marriage, without the wife's consent thereto in writing; but, without such a consent, on the other hand, the husband in Louisiana can lawfully make such a gift of community personalty for such a purpose. (Article 2404 Revised Civil Code of La.)

# Dominion of the Husband Over Community Realty in California and the Other Community Property States.

In every one of the community property states the husband during the marriage is given the management of the community real property. (Section 3850, Civil Code of Arizona; Section 172a, Civil Code of California; Section 4666 Compiled Statutes of Idaho, 1919; Article 2404, Revised Civil Code of Louisiana; Section 2160, Revised Laws of Nevada; Section 2766, New Mexico Code of 1915 as amended Laws New

Mexico, 1915 Chap. 84; Section 4622 Vernon's Sayle's Texas Civil Stats. 1914; Section 6893 Remington's Comp. Statutes of Washington, 1922.) But in Nevada (Section 2160, Revised Laws of Nevada), Louisiana (Article 2404 Revised Civil Code of Louisiana), and Texas (Section 4622 Vernon's Sayle's Texas Civil Stats. 1914) the husband may convey the community real property for a valuable consideration, without the consent or signature of the wife. In Washington the husband has the management and control of the community real property but he cannot sell, convey, or encumber it unless the wife joins with him in executing the deed or other instrument of conveyance. (Section 6893 Remington's Comp. Stat. Wash. 1922.) In Arizona (Section 3850 Civil Code of Ariz.), in Idaho (Section 4666 Comp. Stats. Idaho 1919) and New Mexico, since 1915, (Section 2766 New Mexico Code of 1915 as amended, Laws of Mew Mexico 1915, Chap. 84) the husband cannot sell or encumber community real property without the wife's written consent. In California, however, the husband since 1891 has been without power to make a gift of community real property or to convey the same without a valuable consideration unless the wife consented thereto in writing, and since 1917, under Section 172a of the Civil Code of California, added to the Code in 1917, the husband cannot convey, sell or encumber the real property, or lease it for more than one year, without the consent and signature of the wife. Thus from 1891 to 1917 the right of the husband in California to convey community real property for a valuable consideration without the wife's consent was the same as that

then and now possessed by husbands in Nevada, Louisiana and Texas, and was the same as that possessed by the husband in New Mexico before 1915. 1917 the husband in California, like the husbands in Arizona, Idaho and Washington, and in New Mexico since 1915, must have the wife's consent to any sale or encumbrance of the community real property; but since 1917 the dominion of the California husband over such property has not been as broad as the dominion of husbands in Nevada, Louisiana or Texas. Since 1917 in California alone is the wife's consent required to leases of community real property for more than one year. Thus from 1891 to 1917 in California the husband's dominion over community real property, during the marriage, was no broader than in three and at one time four other community property states, and since 1917 it has not been as broad as in every other community property state. Prior to 1891, about the only practical power the husband had over community real property in California was the power to make a gift or transfer thereof that was not in fraud of the wife's claims

### 6. Testamentary Power of Spouses Over Community Property.

As regards testamentary power over the community property, in Arizona (Section 1100 Civil Code of Arizona), in Idaho (Section 7803, Compiled Statutes of Idaho, 1919), in Louisiana (Articles 915 and 916, Revised Civil Code of Louisiana), and in Washington (Section 1342 Remington's Comp. Statutes of Washington 1922), the wife has the right to make testamentary disposition of one-half of the community property, in case she dies before her husband. The

wife now has such a right in California also, although only since the 1923 amendment to Section 1401 of the Civil Code. (Statutes 1923, p. 29.) However, in Nevada (Section 2164 Revised Laws of Nevada), except when the wife has been abandoned, and in New Mexico (Section 1840 New Mexico Code of 1915) the wife has no testamentary power over the community property, in case she dies before her husband, which was the law in California until the 1923 amendment.

The possession of the power of testamentary disposition of property exists in any case only by grace of some statute and the absence of such a power would therefore not affect the matter of a present interest or a vested estate in the property concerned.

 The Wife's Community Interest in Community Property in California is as Fully Protected As In Any Other Community Property State.

From this brief summary it appears that in those seven community property states where the community interest of the wife is classified by the decisions of their courts as a "vested interest" in the community property, during coverture, the husband, nevertheless, can sell, transfer or encumber the community property, real and personal, without her consent, in every case where the husband in California, since 1917, may do so. It also appears that in three, and before 1915 in four, of the other community property states where the community interest of the wife has been declared to be a "vested interest" in the community property, during coverture, the husband could sell, transfer or encumber the community property, real or personal, without her consent, in every case where

the husband in California since 1891 could have done It likewise appears that prior to 1891 the husband's dominion over community personalty in California was no broader than in six of the other community property states, viz., Arizona, Idaho, Nevada, Texas and Washington and New Mexico (since 1915). So far as the rights of wives in community property may be concerned they are as helpless against the disposition of such property by the husband, whether the wife's "community interest" be called a "vested estate" or "a mere expectancy," and no more and no less so. In substance then the community interest of the wife in community realty has been as secure against the arbitrary dominion of the husband in California since 1891 as in four other states and since 1917 as in any other community property state, and in community personalty it has been as secure, since 1850, as the community interest of the wife in every other community property state except Louisiana, and more secure since 1891 than in any other community property state except New Mexico prior to 1915.

It also appears from a reference to the statutes on the subject that in some of the community property states, viz., in Idaho, Nevada and New Mexico, where the community interest of the wife in community property is classed by the courts as a vested estate (Kohny v. Dunbar, 121 Pac. (Id.) 544; In re Williams Estate, 40 Nev. 241, 161 Pac. 741; Beals v. Ares, 185 Pac. (N. M.) 780), her interest is not of such a character as to descend to her children or her heirs in ease of intestacy (Section 7803, Compiled Statutes of Idaho, 1919; Section 2164, Revised Laws of Nevada;

Section 1840, New Mexico Code, 1915), in this respect resembling the law in California; and in Nevada and in New Mexico the wife has no power of testamentary disposition over her estate in the community property, in this respect resembling the law in California, until it was changed, as aforesaid, in 1923. In Nevada there is one exception to the foregoing statement; in that state if the wife has been abandoned she has a power of testamentary disposition over her half of the community property which descends in such a case to her descendants or other heirs at law, if she should die intestate.

Nor can the wife in those seven other community property states, where her community interest in community property has been characterized as a vested estate, alienate that interest during coverture, when acting alone. The dominion over the community property and the whole of it is either vested in the husband alone, or, in the case of real property, and, in some states, in the case of some special personal property, too, in the husband and the wife. These are the statutory provisions on the subject and the court decisions are in accord. The wife in Texas is without power, alone, to transfer the community property or her half interest therein. (Lasater v. Jamison, Tex. Civil Appeals 203 S. W. 1151.) The wife in Nevada cannot dispose of community property or make any contract that binds it. (Travers v. Barrett, 30 Nev. 402, 97 Pac. 126.) Nor can the wife in Washington dispose of community property or her interest therein. (Mc-Alpine v. Kohler & Chase, 96 Wash. 146, 164 Pac. 755; Litzell v. Hart, 96 Wash. 471, 165 Pac. 393.) In Idaho the wife cannot sell or encumber the community property. (Kohny v. Dunbar, 121 Pac. 544.) In Louisiana

"The husband is the head of the community and has, by law, the right to administer the common property, and the wife has not the right to alienate such property, even for a common debt." (Hart v. Gottwald, 15 La. Ann. 13.)

So that the recognition in the wife of a "vested estate" in the community property gives to the wife no more power of alienation than she could claim if her "community interest" in the community property had been likened to the expectancy of an heir.

In California, on the dissolution of the marriage by divorce, the wife receives her half of the community property in every case except where the divorce is decreed on the ground of extreme cruelty or adultery, in which cases the community property may be assigned to the spouses in such proportions as the court, from all the facts of the case and the conditions of the parties, may deem just. (California Civil Code, Section 146.) In this particular the law of California is like the law of Nevada (Section 2166, Revised Laws of Nevada) and like the law of Idaho. (Section 4650 Comp. Stats. Idaho 1919.) Even under the Spanish law, the wife sacrificed her interest in the community property by adultery. (Locwy on Spanish Community of Acquests, 1 California Law Review, pp. 32, 43.)

In New Mexico the community property is divided between the spouses on divorce or permanent separation. (Sections 2774 and 2781 New Mexico Code 1915.) In Arizona and Washington on divorce the court may divide the community property as it sees fit. (Section 3862 Civil Code Ariz.; Section 989 Remington's Comp. Stats. Wash. 1922, Miller v. Miller, 38 Wash. 605, 80 Pac. 816.) Without pursuing this subject further it is clear, therefore, that there is no uniform rule in the community property states governing the disposition of community property on divorce, except a general recognition of the community interests of each spouse therein.

It thus appears that during coverture the rights of the wife in community property in California are as useful and as valuable to her as the rights of wives in community property in the other seven states concerned and are as fully protected. Her veto on alienation is as broad, and in some cases broader, than the veto on alienation of the wives in the sister states, while the dominion of the husband in California, on the other hand, over community property, during the marriage, is no broader and in some cases not as broad, as in those other states.

### Disposition of Community Property on Death of Either Spouse.

On the death of the husband in California the wife shares as fully in the community property as in Arizona, Louisiana, New Mexico, or Washington.

The wife in California on the death of her husband receives half of the community property. The entire community property is subject to debts, family allowance and the charges and expenses of administration. (Section 1402 Civil Code, California.) But the wife in California receives as large a share of the

community property as the wife would take in New Mexico, Arizona, Louisiana or Washington. The statutes of New Mexico (Section 1841 New Mexico Code of 1915) provide that on the dissolution of the community by the death of the husband the entire community property is subject to his debts, the family allowance and the charges and expenses of administration. It is the half of the residuum of the community property which goes to the wife in New Mexico on the death of the husband. In California the wife gets as much. A like rule applies in Louisiana, Washington and Arizona. (See Section 1342 Remington's Comp. Stats. Wash. 1922.)

In Louisiana the administration of the husband's estate includes the wife's interest in the community and the commissions of the administrator or executor on the community property are fixed to the full extent of that property and not upon the deceased husband's interest alone.

Bertrand's Succession, 123 La. 784, 49 So. 524.

The same rule applies in Washington.

Ritzville First Nat. Bank v. Cunningham, 72 Wash, 532, 130 Pac, 1148;

Lawrence v. Bellingham Bay etc. Co., 4 Wash. 664, 30 Pac. 1099;

Ryan v. Ferguson, 3 Wash, 356, 28 Pac. 910.

And in Arizona in administering the estate of a deceased husband the court properly assumes administration of the whole of the community estate to determine the amount of debts chargeable against it and

to direct their payment out of community property, including the expenses of administration.

LaTourette v. LaTourette, 15 Ariz. 200, 137 Pac. 426.

The "community interest" of the wife in community property in California appears, therefore, to be fully as valuable and equally as protected as the "community interest" of the wives in community property in the other community property states where those interests may be classified by their courts as "vested interests." At only one point might the failure to recognize the wife's "community interest" in California as a "vested interest" prove to have important consequences and that is in the purely local matter of California state inheritance taxes. But since 1917, in California, the wife's "community interest" in half of the community property has been free from state inheritance taxes. (Stats. 1917, p. 880; Stats. 1921, p. 1500; Stats. 1923, p. 694.)

On the death of the wife, before 1923, the whole community property, without administration, belonged to the surviving husband in California, as it does in Nevada (Section 2164 Rev. Laws Nevada) and in New Mexico. (Section 1840 New Mexico Code 1915.) Since 1923, in California the statute has provided (California Civil Code, Section 1401) that on the death of the wife one-half of the community property belongs to the surviving husband, and the other half goes to him, too, unless the wife makes testamentary disposition thereof to others. This is and has been the law in Idaho. (Section 7803 Comp. Stats. Idaho 1919.) In Texas on the death of the

wife one-half of the community property belongs to the husband and the other half goes to him, too, unless she leaves children, in which case her children or their heirs take her half. (Section 2469 Vernon's Sayle's Texas Civil Stats, 1914.) If the wife in Texas left grandchildren but no children the whole community estate in Texas would go to the husband. (Cartwright v. Moore, 66 Tex. 55, 1 S. W. 263.) In Arizona (Section 1100 Civil Code Ariz.), Louisiana (Article 915 Revised Civil Code La.), and Washington (Section 1342 Remington's Comp. Stats. Wash. 1922), on the death of the wife, one-half of the community property belongs to the husband, and the other half is subject to her testamentary disposition and, in the absence thereof, goes to certain of her heirs and, in default thereof, goes to the husband. As regards the testamentary capacity of the wife over her half of the community property and as regards the laws of succession to her half the different community property states vary as above shown. On the death of the wife the husband is now certain of acquiring all the community property only in the states of Nevada and New Mexico; in the other states, including California, he is sure of retaining one-half of the community property, but no more.

# Application of the Substantial Similarity in the Community Property System of all States to the Issues in This Case.

The points of substantial similarity among all the community property states as they affect the issues in this case may be considered under the following heads; (a) the character of the community property; (b) the dominion of the husband, during coverture;

(c) the veto of the wife on alienation, during coverture; (d) the rights of the wife on dissolution by death; (e) the rights of the husband on dissolution by death; (f) the rights of the husband and wife on dissolution by divorce; and (g) the rights of the spouses to division in separation or support suits.

## (a) The Character of the Community Property.

The property which becomes community property is the same in all community property states, including California, except, as in minor particulars, in some, not all, of the states concerned the uniformity is broken by the diversified provisions concerning the wife's earnings and the income from separate property.

These differences about earnings of the wife and about income from separate property in the vast majority of cases have little practical effect on community income. The community income in the case of nearly all taxpayers would be derived from the earnings of the husband, or from community property investments made from accumulations representing the past earnings of the husband. In all eight states such income would be community property. For this reason there is therefore a practical identity between what constitutes community income and property in all the community property states.

This practical identity is what has controlled the regulations of the Treasury Department as to the other seven states on the subject of income taxes in the past. Thus the right of the spouses to divide community income in Texas was not influenced by

the fact that in Texas income from separate personal property was community income, while income from separate real property was not, nor did the contrast between this rule in Texas and that of other states prevent the division of community income in Idaho, where income from both separate real and personal property was community income, or in Arizona, Nevada, New Mexico or Washington, where income from either real or personal separate property was not community income. Why then should such a division be denied in California, which, in this matter, is in accord with the last four named states? right of the spouses to divide community income in Washington was not influenced by the fact that in Washington the wages of her personal labor were the separate property of the wife, because that same right was granted to such states as Idaho, Nevada, New Mexico, Texas, and Louisiana, where the earnings of the wife, like the earnings of the husband, were community property, and to a state like Arizona, where the earnings of the wife were community property. except in the special case, when she was living separate and apart from her husband. Why then should a division be denied in California, which in this matter is in accord with the law in Idaho, Nevada, New Mexico, Louisiana and Texas, except that California. like Arizona, makes an exception of the special case where the wife lives separate and apart, an exception that hardly makes a ripple in the general current of uniformity?

## (b) The Dominion of the Husband During Coverture.

Referring now to the dominion of the husband over community property during coverture, in none of the states is this dominion absolute. As Mr. Justice Holmes said in *Arnett v. Reade*, 220 U. S. 311, 31 Sup. Ct. R. 425, speaking of the restraint on voluntary alienation in favor of the wife:

"For it is conceded by the court below and everywhere, we believe, that in one way or another she has a remedy for an alienation made in fraud of her by her husband."

The veto power on alienation vested in the wife in California has been already referred to. In California, as in the other community property states, the husband never could deprive the wife of her half by testamentary disposition. The dominion of the husband, during coverture, over community property in California, is no broader than in the other community property states. In permitting a division of the community income in the other seven community property states, the differences between the dominion of the husband in Nevada and the dominion of the husbands in Arizona or Washington raised no difficulties. The same Treasury regulations on the subject applied to all. Why should a division of community income be authorized in all these other seven community property states and denied in California, where, since 1917, the dominion of the husband is by law the most limited of all and prior to this time was as limited as in many?

The variations in the dominion of the husband over community property in the eight community property states are variations in dominion only, to suit the varying moods of local public opinion. Ownership and dominion are not interchangeable terms. The community interest of the wife in the community property is everywhere recognized, by whatever name it may be labeled by court decisions, seeking to draw common law analogies, and without regard to the varying or limited dominion of the husband over it or lack of dominion of the wife over it. But if the husband's dominion over community property is a factor at all in determining the incidence of federal income taxes there is no justification for distinguishing California from the other community property states.

## (c) The Veto of the Wife on Alienation During Coverture.

A veto on the alienation of community property is possessed now in broader degree by the wife in California than in any other community property state. This veto gives the wife in California rights in relation to the community property, the surrender of which constitutes a valuable consideration for a transfer, as was decided in the Estate of Brix, 181 Cal. 667. These rights of veto have substantive character. Thus in Dargie v. Patterson, 176 Cal. 714, it was held that the conveyance of specific community property by the husband, without the consent of the wife and without a valuable consideration, was voidable by the wife as to her half interest in that specific property though the court held that the conveyance was valid as to the husband's half interest therein and binding on his heirs and devisees. In that case the wife, suing after her husband's death, was held entitled to recover her

half of that specific property from the husband's grantee. The wife in that case was recognized as having a half interest in every specific item of community property, and the effort, accordingly, to compel her to take from her husband's estate in satisfaction of her claim property equal in value to her half interest in the community property so granted was denied by the court. These vetoes of the wife on alienation in California, though extending over a slightly broader group of conveyances than in the other community property states, are substantially similar to those given to the wife in the other states. In California, as in the other states, they are designed to protect the wife's "community interest" in the community property. The veto varies among the several community property states. That variation, however, did not prevent the division of community income in every one of the other seven community property states. Giving to the real and substantial "community interest" of the wife in community income the significance which it merits in California, and which her veto there connotes and indicates, why should a division of community income be permitted in the other seven states and refused in California? Surely it is no reason for such a distinction that since 1917 the veto of the wife on the alienation of community realty is greatest in California and prior to 1917 was as great as in many other community property states, or that since 1891 her veto on the alienation of community personalty, which is the form that community income takes, is greater than in any other community property state, or that prior to 1891 the husband's dominion during coverture over community personalty in California was no greater than in any other community property state, with the single exception of Louisiana.

## (d) The Rights of the Wife on Dissolution by Death.

Compare the rights of the wife in community property on the death of the husband in the different community property states and it appears that in all of them, including California, the interests of the wife covers one-half of the community property. The other half is subject to the testamentary disposition of the husband. In California, as in Arizona, New Mexico, Louisiana and Washington, what the wife gets is one-half of the residuum after paying the debts and the charges and expenses of administration. The fact that the wife in the last four named states took only half of the residuum of the community estate did not affect the right of dividing community income in those states. Why should that right be denied in California where the wife on the death of her husband shares as fully and as completely in the community property as in Arizona, New Mexico, Louisiana and Washington?

# (e) The Rights of the Husband on Dissolution by Death.

Comparing the rights of the husband in community property on the death of the wife in the several community property states and it is disclosed that in two states, Nevada and New Mexico, the whole community estate goes to the husband on the wife's death. This was the rule in California prior to 1923. In all the other community property states, including California, since 1923, on the death of the wife, one-half of

the community property belongs to the husband and the other half is subject to the testamentary disposition of the wife, as in Arizona, California, Idaho, Louisiana and Washington, or, as in Texas, goes to her children and their heirs provided the wife leaves children surviving. Past these points minor differences develop in the different states such as have already been referred to. If the manner of the disposition of property after death has any bearing at all on the right to divide community income for the purposes of federal income taxes during life, there is substantial accord on the subject among the community property states. The differences favoring the succession of the husband in Nevada and New Mexico (such as obtained in California prior to 1923) have not, however, affected the right of taxpayers in Nevada and New Mexico to divide community income as well as in the other five community property states which differed from them in this respect. Why is California marked for an invidious distinction in the division of community income? The husband in California prior to 1923 on the death of his wife was entitled to no larger share of the community estate than he was and still is entitled to in Nevada and New Mexico. and since 1923 he is entitled in his own right to no larger share than in the other five community property states, his rights in that matter since 1923 being in exact parallel with those of a husband in Idaho.

# (f) The Rights of Husband and Wife on Dissolution by Divorce.

As supporting the real and substantial rights of a wife in community property in California, it is the law that though the husband secures a decree of divorce from his wife for her fault in the premises on any one of the following grounds, viz., willful desertion, willful neglect, habitual intemperance or conviction of a felony (California Civil Code, Section 92), yet in every such case under the provisions of the statute (California Civil Code, Section 146) the community property must be equally divided between the parties, guilty and innocent, and if the court should neglect or fail to do so, the law would automatically make just such an equal division. (Estate of Brix, 181 Cal. 667, 676; Taylor v. Taylor, 192 Cal. 71.) The law would make just such an automatic division on divorce in Texas. (Jones v. Frazier, 201 S. W. 445.)

## (g) The Rights of the Spouses to Division in Separation or Support Suits.

And, in California, the wife can force an equal division of the community property in a suit for support and maintenance without applying for a divorce. (See Appendix B of this brief.) The California statute on the subject of divorce is like that of Nevada, and on the subject of support and maintenance is like that of New Mexico. There is nothing in the California law on either of these subjects that would justify making a distinction against California as against the other community property states in the matter of dividing community income.

Looked at by and large the community property system in California is substantially like that of the other seven community property states. Looking through form to substance, the respective rights and privileges of the spouses with regard to community property are strikingly alike in all the community property states, including California. As there is no substantial difference between the incidents of community income in California and the incidents of community income in the other seven community property states there are no grounds for the federal government to tax community income in California upon a different basis and at a higher rate than community income in the seven other states.

## The Relative Insignificance of the Legal Tagging of the Wife's Community Interest in Community Property in California and the Other States.

What is there which has distinguished California from the other community property states in the eyes of the Treasury Department? It is a difference in a matter of form, a difference in legal tagging, a difference that is not justified by the shadow of substance; it is what might be called a mere metaphysical distinction which is without a real sanction. The incidents of a right are what determine the substance of that right, not the name by which it may be locally classed.

In the other seven community property states the community interest of the wife in community property has been referred to by the courts as an "estate" or present "vested interest". In California the wife's "community interest" as measured by the law, prior to the changes therein in 1917, has been likened by the California courts in one line of decisions to the expectancy of an heir, and it has been said in one line of decisions only, with reference to the law as it read before 1917, that she took her share in the community

property on the death of her husband, as an heir. The distinction made by the application of these two legalistic labels to the substantially similar rights of the wives in California and in the other seven states is not a distinction that is made in terms in any of the statutes concerning the community property system in any of the states adopting it. The statutory provisions on the subject in the various states are substantially similar and are sometimes literally duplicated. The distinction is thus a judge made and not a statutory one.

The heirship label did not have the effect to increase or diminish the substantive rights of either husband or wife in community property in California, except as, prior to 1917, it subjected the half interest passing to the wife on the death of the husband to a state inheritance tax and except as that theory may be the foundation, though it is not necessarily the only foundation, for denying the application to previously acquired community property of such a veto on alienation as was given to the wife over gifts in 1891 and over the conveyance, encumbrance or lease of real property in 1917. All community income, in the form of the earnings of the husband and of the wife in California, since 1917, and that represents probably at the least 95 per cent of it, is governed by the law as it was changed in 1917, and not by the law as it was in force before those changes of 1917. So far as such community income in California since 1917 is concerned, to apply the heirship label to the "community interest" of the wife therein, if it is conceivable that the California courts would do so, would not increase or diminish the substantive rights of either husband or wife in that community income or affect them in any practical manner. Since 1917, therefore, this judge made distinction between California and the other seven states has been purely nominal rather than real and is a distinction that the legislation in California in 1917 has made obsolete for practical purposes. Prior to 1917 such a distinction had little practical significance beyond the incidence of state inheritance taxes, and in those California decisions, where insisted upon, it was made in the teeth of such provisions of the California statutes as are found in Sections 161, 678, 679, 680 and 682 Civil Code California and in utter disregard of a parallel line of conflicting California decisions.

The heirship label did not increase or diminish the substantive rights of either husband or wife in community property in California, as compared with the substantive rights of a husband or wife in community property in the other community property states. It did not enable the husband to transfer community property in fraud of the wife's rights (Clavo v. Clavo, 10 Cal. App. 447, 102 Pac. 556; Shiels v. Nathan, 12 Cal. App. 604, 108 Pac. 34) or authorize him after 1891 to make a valid gift thereof without the wife's consent. (Dargie v. Patterson, 176 Cal. 714.) When the California husband after 1891 could not make a valid gift of community property or transfer it with out a valuable consideration, except with the wife's written consent thereto, the husband clearly no longer had the absolute dominion over it or the right to dispose of it according to his pleasure, rights which, by

the express provisions of Section 679 of the California Civil Code, he must possess to claim to be the absolute owner of the community property. Even prior to 1891 the husband's dominion was qualified, because he could not convey in fraud of the wife's rights and therefore his ownership of the community property has always been qualified. As the husband has never really been the absolute owner of the community property in California, whatever his dominion may have been the balance of the ownership must reside in the wife. Each are qualified owners.

In California the ownership of property is either absolute or qualified. (Section 678 Civil Code California.) "The ownership of property is absolute when a single person has the absolute dominion over it, and may use it or dispose of it according to his pleasure, subject only to general laws." (Section 679 Civil Code California.) The husband never was the absolute owner of the community property, because he never had the absolute dominion over it or the right to dispose of it according to his pleasure. He never could "dispose" of the wife's half interest therein by will. He never could "dispose" of her half interest therein in fraud of her rights, or since 1891 make a gift thereof without her written consent, or since 1917 convey, sell or encumber real property or lease it for more than one year without her written consent. With these limitations on the husband's ownership the balance of the ownership must reside somewhere and necessarily in the wife. In California when the ownership of property is shared with one or more persons it is qualified. (Section 680 Civil Code California.) "The ownership of property by a single person is designated as a sole or several ownership." (Section 681 Civil Code California.) And finally it is provided in California that

"The ownership of property by several persons is either:

1. Of joint interests;

2. Of partnership interests;

3. Of interests in common:

4. Of community interest of husband and wife."

(Section 682 Civil Code California.)

These statutes very consistently recognize the "community interest" of husband and wife as residing in both, in the form of a qualified ownership in each. The community interest of husband and wife by the last section referred to is very clearly recognized as a form of the ownership of property by several persons, thus contrasting it sharply with the sole or several ownership defined in the preceding Section 681. Joint interests, partnership interests and interests in common are carefully defined in succeeding sections clearly distinguishing them from the "community interest". (Sections 683, 684, 685, 686 and 687 Civil Code California.) These statutes recognize the wife during coverture as the owner of a "community interest" in the community property in California just as clearly as they recognize one of two joint tenants as the owner of a joint interest in the property held in joint tenancy.

During the marriage this "community interest" of the husband and the wife persists. On the dissolution of the marriage by death or divorce the "community interest" terminates and out of it arises the several ownerships of the spouses or their estates or a tenancy in common. Such a several ownership in equal division, a sort of partition, may be decreed by the courts in California, prior to dissolution of the marriage, in a maintenance or support suit. (See Appendix B.) During a joint tenancy the "joint interests" of the joint tenants persist. On the termination of the joint tenancy by death the several ownership of the survivor arises. The wife surviving a husband and becoming possessed of a several ownership in half of the community property is more like a survivor of two joint tenants than she is like an heir. Her interest, unlike the expectancy of an heir, cannot be cut off by any testamentary disposition. Where the wife, as in California, prior to 1923, and as is still the case in some of the other community property states, had no power of testamentary disposition over her half of the community property, her right to half of that property in sole and several ownership or as a tenant in common with his heirs is of course dependent on her surviving her husband, unless the marriage should be dissolved by divorce, or unless she should secure a division of the community property in a maintenance or support suit. Because, however, that right to a several ownership or a tenancy in common may be contingent on survivorship, it does not follow that she is without during coverture the present "community interest" so clearly recognized by Section 682 of the Civil Code of California. That "community interest" the wife in California, ever since 1923, has been empowered to dispose of by will (Section 1401 Civil Code California as amended Stats. 1923, p. 30), which certainly gives to it the character of a present interest. But even prior to 1923 that "community interest" of the wife had the character of a present interest for on her death, if her husband survived her, it went to him, though, in this particular, the law has been the subject of certain changes.

In 1850 the statute provided (Stats. 1850, p. 254, Section 11) that upon the dissolution of the community by death one-half of the community property should go to the survivor and the other half to the descendants of the deceased spouse, if there were such, otherwise to the survivor. In 1861 the statute was amended (Stats. 1861, p. 310) so that on the death of the wife before her husband the whole of the community property should go to the surviving husband. In 1872 upon the adoption of the codes Section 1401 of the Civil Code of California read as follows:

"Upon the death of the wife, the entire community property, without administration, belongs to the surviving husband, if he shall not have abandoned and lived separate and apart from her; but if the husband shall have abandoned his wife and lived separate and apart from her the half of the community property, subject to the payment of debts chargeable to it, is at her testamentary disposition, and in the absence of such disposition goes to her descendants or heirs at law, exclusive of her husband."

In 1874 this section of the Civil Code was amended this time to read as follows:

"Upon the death of the wife, the entire community property, without administration, belongs to the surviving husband, except such portion thereof as may have been set apart to her by judicial decree, for her support and maintenance, which portion is subject to her testamentary disposition, and in the absence of such disposition, goes to her descendants or heirs, exclusive of her husband." (Amend. to Codes 1873-74, p. 238.)

In this form the section remained unchanged until 1923 when the amendment thereof was adopted which has given to the wife the right of testamentary disposition of her half of the community property.

Obviously the statute of 1850 recognized the "community interest" of the wife in the community property, during coverture, as an interest, analogous in a very substantive way to a present interest or estate. as known to the common law, for otherwise it could not provide for the succession of her descendants to that interest on her death before her husband. succession of descendants is predicated upon the presence of an estate in the ancestor. The Statute of 1861 none the less recognized such a "community interest" of the wife in the community property during coverture, merely because for her descendants it substituted her husband as entitled to take her community interest which they would have taken before. So Section 1401 of the Civil Code as adopted in 1872 providing for the wife's right of testamentary disposition and the succession of her heirs, in case of abandonment was an equally clear recognition of her "community interest" as substantively a present interest for only over such a present interest could a testamentary disposition be exercised and only on such a present interest could a succession be predi-

The "community interest" of the wife was cated. not contingent upon abandonment, though her heirs' right of succession, if she died intestate, and her right of testamentary disposition were so contingent. The very provisions of the Statute of 1861 and of the later Statute of 1874 declaring that the entire community property should go to the surviving husband on the death of the wife are in themselves, and divorced from their respective historical legislative backgrounds, an implied recognition of a present community interest of the wife in the community property during coverture. Otherwise the provisions of those statutes would be idle enactments. There would have been no necessity to provide for such an accretion to the husband if the community property had been his property during coverture in which the wife had no interest.

The phrases "present interest," "future estate," vested future interest," "vested estate" and other like phrases are all terms for common law concepts having reasonably precise meanings when employed in connection with a common law system. They are merely convenient terms to denote the status of rights to property as recognized by the common law and more particularly with reference to the time of enjoyment thereof. They are not necessarily suited to denote the status of rights to property, recognized by the civil law, or to such concepts of property rights as are involved in the community property system of French or Spanish origin. There are interwoven in the "community interest" of husband and wife in community property, certain rights of the wife with reference to

such property which are unknown to the common law. To attempt to apply common law terminology to Spanish law concepts is to court disaster, where the status of rights to property recognized by the latter is so different from the status of rights to property developed by the common law. The decisions in the other seven states which have applied common law terms to express the status of the wife's interest in community property in those states have not added one element of right to her interest. Those decisions in California which have declined to apply such common law terms as "vested estate" or "present interest" to describe the wife's interest in community property have not taken away any rights from her interest. The interests of the wives in community property in all the community property states are substantially the same. To urge that the wife in California has no interest in the community property, during coverture, at all, that she only has a possibility like the expectancy of an heir is indefensible, when the wife's right to one-half of that property on her husband's death cannot be cut off by his will, and, when during the marriage, if the husband makes a gift of the community property, it is voidable as to her half interest in the property, if she has not consented to the gift in writing, and when by the statutory law her community interest in the property is frankly and expressly recognized, not to mention other rights of the wife developed by statute in 1917.

To rest a distinction of California from the other community property states on the ground that the California courts, in a series of decisions that incidentally do some violence to the terms of the California statutes, had declined to label the community interest of the wife as a present interest or as a "vested estate," when the courts in the other seven states had classified the substantially similar community interest of the wife as a "vested interest," would place that distinction on no solid foundation, particularly when the series of California decisions, so relied upon, are chronologically paralleled by another series of conflicting California decisions in which the opposite position is taken. In substance "the community interest" of the wife in California is similar to "the community interest" of the wife in any other community property state. It is here, as there, an interest in one-half of the community property, recognized and protected as such, though a qualified dominion over the same may be placed in the hands of the husband.

## IV.

THE FEDERAL INCOME TAX IS A TAX ON INCOME AND IN COMPARING CALIFORNIA WITH OTHER COMMUNITY PROPERTY STATES THE COMPARISON IS MORE PROPERLY CONFINED TO THE INCIDENTS OF COMMUNITY INCOME OR COMMUNITY PERSONALTY.

The community income in California may consist wholly of the earnings of the husband, or it may arise from the earnings of the husband and from community property investments, or it may be the total of the earnings of both husband and wife or it may consist wholly of the earnings of the wife and in all four cases it is in California still community income. An

income in California for the calendar year 1919 totaling \$10,000 may thus fall into one of four cases, and in each case be community income.

Case 1.	Earnings of husband		\$10,000
Case 2.	Earnings of husband	\$9,000	
	Income from com-		
	munity property	1,000	\$10,000
Case 3.	Earnings of husband	\$5,000	
	Earnings of wife	5,000	\$10,000
Case 4.	Earnings of wife		\$10,000

The income in Case 1 and Case 2 would be community income and community property in every community property state including California. income in Case 3 would be community income and community property in California and in every other community property state except Washington, where the earnings of the wife would be excluded from community income. The income in Case 4 would be community income and community property in California and in every other community property state except Washington. The earnings of the wife would be excluded from the community income in Case 3 or Case 4 in California and Arizona, only in the exceptional case that the wife was living separate and apart from her husband. For purposes of the federal income tax this community income by the regulations of the Treasury Department may be divided in every community property state except California. Why should it not be similarly divided in California. where the substantial rights of the wife in that income are as great as in any other community property state, and where the substantial rights of the husband therein are no greater?

It is clear that the taxes imposed by the federal income tax law are taxes on annual income, as definitely authorized by the 16th Amendment to the Constitution. To the extent that such income constitutes community property in California it is income, to which, by the express provisions of Section 682 of the California Civil Code, there attaches a "community interest of husband and wife," however the respective relationships of husband and wife thereto may be otherwise labeled, and this community income is subject to the incidents of the California community property system in force in that state. Normally such income represents the earnings of the husband. It may also represent the earnings, if any, of the wife and the rents, issues and profits, if any, of community real and community personal property. What constitutes community real and personal property and community income in any other community property state constitutes community property and income in California, except as in Idaho, Louisiana and Texas the rents and profits of the separate property of the respective spouse accruing after marriage are also community income, and except as in Arizona and California the earnings of a wife living separate and apart from her husband are her separate property and, as in Washington, the earnings of a wife are her separate property. These few slight variations, however, merely increase or diminish the sources of community income instead of affecting the incidents thereof. In Idaho and Texas alone is the disposition of the wife's earnings vested in her when it constitutes community income. In Nevada the wife may use her earnings for the care and maintenance of the family. This difference in the incidents of community income in those three states from the incidents of such income in the other community property states concerns only a relatively small fraction of the aggregate community income in the eight states having a community property system and is proportionately too small an item to control general principles.

The husband in California as in the other community property states never has had the absolute dominion over the community income. Nowhere could the husband dispose of such community income in fraud of the wife's rights therein. (Arnett v. Reade, 220 U. S. 311; Smith v. Smith, 12 Cal. 216; De Godey v. Godey, 39 Cal. 157; Lord v. Hough, 43 Cal. 581.) Nowhere, not even in California, can or could the husband make a testamentary disposition of the wife's half of that income or of any community property. (Beard v. Knox, 5 Cal. 252; Scott v. Ward, 13 Cal. 458, 469; Payne v. Payne, 18 Cal. 291, 301; Stats. 1850, p. 254, Stats. 1861, p. 310, Stats. 1863-64, p. 363, Section 172 Civil Code California.) Both of these restrictions on the dominion of the husband over community property and community income have always existed in California. In 1891 the dominion of the husband in California over community property and community income, during coverture, was subjected to a further restriction by the proviso added in 1891 to Section 172 Civil Code California (Stats. California

1891, p. 425) reading "provided, however, that he cannot make a gift of such community property or convey the same without a valuable consideration unless the wife, in writing, consents thereto." All earnings of the husband and wife, all rents, issues and profits of community real or personal property acquired after the amendment of 1891 were and are subject to that proviso. The limitation on the dominion of the husband in California, during coverture, over the community income and other community personalty from 1850 to 1891 was as broad in California, during that period, as it was then and is now in Arizona, Idaho, New Mexico, Nevada, Texas and Washington. Community income from whatever source until it may be invested in real property remains community personalty and may be disposed of by the husband in any community property state, as permitted by the laws thereof regulating his dominion. In California, since 1891, the limitation on the dominion of the husband, during coverture, over community income, so long as it remained community personalty, has been as broad as, if not broader than, it is now or has been, in any one of the other community property states. statutory differences between the dominion of the husband in California, during coverture, and in the other community property states has existed more pointedly with reference to community real property, and as to that between 1891 and 1917 the dominion of the husband in California, during coverture, was at least as limited as the present dominion of husbands in Louisiana, Nevada and Texas, and since 1917 it has been more limited than in any other community property state. The actual effect of the amendment of 1891 in California has been that in conveyances of real property even for a valuable consideration and before the amendment of 1917 it was the practice to insist upon the joint execution of such conveyances by the husband and wife—a practice so general that the California courts took judicial notice of it. (Estate of Brix, 181 Cal. 667, 676.) The point we would emphasize here, however, is that there are and have been practically no substantial differences, between the dominion of the husband over community personalty and therefore over community income in California and in the other community property states, except as in California, since 1891, it has been more limited there than in the other states, all of which has been shown more fully in the earlier pages of this brief.

If the husband, in California, as in the other community property states, should have been stricken by death, at any time since 1850, the wife would be entitled to receive one-half of any community income then accruing and one-half of any property which represented the investments of prior accumulations of any community income, and in California no testamentary disposition attempted by the husband could deprive the surviving wife of this one-half share. If the wife in California, at any time since 1850 (Stats. California 1850, p. 254, Section 12; Section 146 California Civil Code), should desert her husband and he should obtain a divorce from her on that ground, the wife would nevertheless be entitled to one-half of the community property, property, by the way, which can only be acquired out of community income and its in-

This also is the law in such community property states as Louisiana, Nevada and New Mexico. In California, since 1891, the husband without the written consent of the wife has not had the power to make a valid gift of community income or of community property even to his father, mother, or children, as well as to no other person. This restriction is statutory and applies to community personalty and community realty. In such community property states as Arizona, Idaho, New Mexico (since 1915), Nevada. Texas and Washington, where the management, disposition and control of community personalty is vested in the husband alone, there is no such statutory restriction on gifts thereof by the husband during coverture as has existed in California since 1891. New Mexico once had a similar statutory restriction on gifts but it was dropped in 1915. True it is that a gift or transfer in fraud of the wife's rights would be voidable if not void, in any community property state, including California, but a gift in a reasonable amount to children could be sustained in the other states, and is authorized by statute in Louisiana, while, since 1891, it has not been permitted in California.

Noting such incidents as the foregoing which attach to community income and community personalty in California, observing the restrictions on the dominion of the husband over community property during coverture, the division thereof on death, the division thereof on divorce even for the fault of the wife, and the limitation on gifts during the marriage relation—noting that ever since 1872, Section 161 of the Cali-

fornia Civil Code has provided that "a husband and wife may hold property as joint tenants, tenants in common, or as community property" and that Section 682 of the same code has read and still reads that the ownership of property by several persons is either of joint interests, of partnership interests, of interests in common or "of community interest of husband and wife"-noting all these things and realizing that income taxes actually fall on things of real substance and not on matters of mere form, and are charged to the substantial or equitable owner and not to the nominal owners, what justification can there be for the Government in the levy of income taxes to collect taxes at a higher rate from the community interest of husband and wife in California than from the community interest of husband and wife in the other community property states? The incidents of that community interest in community income are and have been substantially identical in all the community property states. The judge made tags for the relations of the husband and the wife to community property have not affected the substance of their rights. As in substance those rights are similar, whether they arise under the laws of California or under the laws of any other community property state, community income should be taxed alike under the federal income law in every community property state, including California.

There can be, we submit, no justification for denying to California taxpayers what is granted to the taxpayers in the other seven community property states.

We believe such a division of community income is properly authorized in the other seven states.

### V.

THE CONDITIONS OF THE COMMUNITY PROPERTY SYSTEM ARE SO DIFFERENT FROM THOSE OF A COMMON LAW PROPERTY SYSTEM AS TO JUSTIFY A DIVISION OF COMMUNITY INCOME IN THE COMMUNITY PROPERTY STATES.

There is a good and proper reason for allowing the husband and the wife in the other community property states to divide their community income for the purpose of the federal income tax, and that reason is as applicable to the conditions of the community property system in California as in the other community property states.

The husband in California, as in the other community property states, has not the same dominion over the community income as the husband has over his earnings in those states where the community property system does not prevail. Yet in over 95 per cent of marital communities the community income in California as in the other seven states affected will come wholly from the earnings of the husband. husband in a community property state like California cannot give away any community income (though it may consist wholly of his earnings) to his father or mother, to his children or to any other relative, or to any charity, or to any person, without the written consent of his wife. Over half of this community income and other community property the husband in California, as in the other seven states, has no testamentary disposition. In a suit for maintenance or in a suit for divorce the husband in California, as in some of the other seven states, may be obliged to yield up to the wife half of this community property, in addition to paying alimony. He will be obliged on divorce to divide the community property, perhaps accumulated entirely from his earnings, with a wife who has deserted him, or who has been convicted of a felony, or who is divorced from him for her cruelty, neglect or intemperance (Sections 92, and 146 Civil Code of California). If the husband in California, or in any other community property state, dies half of this community property must go to the wife no matter what the family conditions may be and out of the husband's half alone can he provide for his parents, his children or any one else. In all these particulars California is substantially similar to the other community property states. In all of the eight community property states community income is hedged about by restrictions during the marriage and upon its dissolution that distinguish it materially from the earnings or income of a husband in the other American states and justify a different treatment in the matter of federal income taxes.

The community property system of law as it exists in all the community property states is more analogous as a matter of legal principle and substantial fact to a partnership than to any other common law status. The dominion of the husband over community property and community income nowhere absolute in any community property state is in substance analogous to the status of a trustee at common law with broad powers of administration. The community property and community income consisting as it does, almost entirely in fact of the husband's earnings, accruing or invested, is property in which there is a community interest, the husband and wife sharing therein in

equal degree, because it is the underlying philosophy of the community property system that all community acquisitions grow out of the joint labor of the spouses though the sphere of one may be the office and of the other it may be the home. This differentiates community income and property in a very marked way from the income and property springing from like sources in the common law states, and this difference is what justifies the right of dividing income in community property states for the purposes of the federal income tax. The Government does not tax one partner on the income of the partnership or tax the trustee on the income of the trust estate in which two or more beneficiaries share. So it should not tax the husband on the income of the community in which husband and wife have equal substantive interests. The married taxpayers in common law states are not unjustly discriminated by the rule permitting a division of community income in community property states for in the common law states the wife has no such interest in the husband's earnings and in the investments thereof as she has in the community property states. Should a husband and wife in a common law state desire the right of dividing such income for income tax purposes, they could secure it by creating through contract the same property rights and relationships and restrictions over the dominion thereof as are by law imposed on the husband and wife in the community property states.

### VI.

#### CONCLUSION.

We submit that there is no substantial difference between California and the other seven community property states which warrants a divided community income in those other seven states and justifies denying it to California.

The rule of the Treasury Department which permits a divided income in seven community property states is not only a just rule but Congress has twice recognized it as such when in 1921 and 1924 it refused to change it by statute. That rule if justifiable in those seven states is an equally proper and the only correct rule applicable to California.

Dated, San Francisco, September 22, 1925.

Respectfully submitted,

ALLEN G. WRIGHT,

Amicus Curiae.

(APPENDIX FOLLOWS.)

Appendix.

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# Appendix A

# STATUTES AFFECTING HUSBAND'S DOMINION OVER COMMUNITY PERSONALTY.

#### Arizona.

All property acquired by either husband or wife, during the marriage, except that which is acquired by gift, devise, or descent, or earned by the wife and her minor children while she has lived or may live separate and apart from her husband, shall be deemed the common property of the husband and wife, and during the coverture personal property may be disposed of by the husband only; but husband and wife must join in all deeds and mortgages affecting real estate except unpatented mining claims, which may be conveyed by the husband or wife only, as provided by the laws of this state relating to conveyances; provided, that either husband or wife may convey or mortgage separate property without the other joining in such conveyance or mortgage (Section 3850 Civil Code Arizona 1913).

#### California.

Law of 1850. The husband shall have the entire management and control of the common property with the like absolute power of disposition as of his own separate estate (Section 9 California Stats. 1850, p. 254). (This never included the right of testamentary disposition, *Beard v. Knox*, 5 Cal. 252.)

Law of 1872. The husband has the management and control of the community property with the like absolute power of disposition (other than testamentary)

as he has of his separate property (California Civil Code, Section 172 as enacted March 21, 1872.)

Law of 1891. The husband has the management and control of the community property with the like absolute power of disposition (other than testamentary) as he has of his separate estate; provided, however, that he cannot make a gift of such community property, or convey the same without a valuable consideration, unless the wife, in writing, consents thereto. (California Civil Code, Section 172 as amended Stats. 1891, p. 425.)

Law of 1901. The amendment of 1901 read like the law of 1891 except as it added "provided, also that no sale, conveyance or encumbrance of the furniture, furnishings and fittings of the home or of the clothing and wearing apparel of the wife or minor children, which is community property, shall be made without the consent of the wife."

Law of 1917. The husband has the management and control of the community personal property, with like absolute power of disposition, other than testamentary, as he has of his separate estate; provided, however, that he cannot make a gift of such community personal property, or dispose of the same without a valuable consideration, or sell, convey, or encumber the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the wife or minor children that is community, without the written consent of the wife. (California Civil Code, Section 172 as amended Stat. 1917, p. 829.)

The husband has the management and control of the community real property, but the wife must join with him in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered; provided, however, that the sole lease, contract, mortgage or deed of the husband, holding the record title to community real property, to a lessee, purchaser or encumbrancer, in good faith without knowledge of the marriage relation shall be presumed to be valid; but no action to avoid such instrument shall be commenced after the expiration of one year from the filing for record of such instrument in the recorder's office in the county in which the land is situate. (California Civil Code Section 172a.)

#### Idaho.

The husband has the management and control of the community property, except the earnings of the wife for her personal services and the rents and profits of her separate estate. But he cannot sell, convey, or encumber the community real estate unless the wife join with him in executing and acknowledging the deed or other instrument of conveyance, by which the real estate is sold, conveyed or encumbered. (Section 4666 Comp. Stats. Idaho, 1919.)

The wife has the management and control of the earnings for her personal services, and the rents and profits of her separate estate. (Section 4667 Ibid.)

### Louisiana.

The husband is the head and master of the partnership or community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title, without the consent and permission of his wife. He can make no conveyance inter vivos, by a gratuitous title, of the immovables of the community, nor of the whole, or of a quota of the movables, unless it be for the establishment of the children of the marriage. Nevertheless he may dispose of the movable effects by a gratuitous and particular title, to the benefit of all persons. But, if it should be proved that the husband has sold the common property, or otherwise disposed of the same by fraud, to injure his wife, she may have her action against the heirs of her husband, in support of her claim in one-half of the property, on her satisfactorily proving the fraud. (Article 2404 Revised Civil Code of Louisiana 1912.)

#### Nevada.

The husband has the entire management and control of the community property, with the like absolute power of disposition thereof, except as hereinafter provided, as of his own separate estate; provided that no deed of conveyance, or mortgage, of a homestead as now defined by law, regardless of whether a declaration thereof has been filed or not, shall be valid for any purpose whatever, unless both the husband and wife execute and acknowledge the same as now provided by law for the conveyance of real estate. (Section 2160 Rev. Laws of Nevada, 1912.)

In 1917 this section was amended (Stats, 1917, p. 121) by the addition of the following proviso, "provided further, that the wife shall have the entire management and control of the earnings and accumulations of herself and her minor children living with her, with like absolute power of disposition thereof, when

said earnings and accumulations are used for the care and maintenance of the family." (See Vol. 3 Revised Laws of Nevada 1919, Section 2160, p. 2813.)

#### New Mexico.

The husband has the management and control of the community property, with the like absolute power of disposition, other than testamentary, as he has of his separate estate; provided, however, that he cannot make a gift of such community property, or convey the same without a valuable consideration, unless the wife, in writing, consent thereto, and provided, also that no sale, conveyance or encumbrance of the homestead, which is then and there being occupied and used as a home by the husband and wife, or which has been declared to be such by a written instrument signed and acknowledged by the husband and wife and recorded in the County Clerk's Office of the County, and furniture, furnishings and fittings of the home, or of the clothing and wearing apparel of the wife or minor children, which is community property, shall be made without the written consent of the wife. (Section 2766 New Mexico Code, as in force in 1907 to 1915.)

The husband has the management and control of the personal property of the community, and during coverture the husband shall have the sole power of disposition of the personal property of the community other than testamentary, as he has of his separate estate; but the husband and wife must join in all deeds and mortgages affecting real estate; provided, that either husband or wife may convey or mortgage separate property without the other joining in such conveyance or mortgage; and provided further, that any transfer

or conveyance attempted to be made of the real property of the community by either husband or wife alone shall be void and of no effect. (Section 2766 New Mexico Code of 1915.) See Laws N. M. 1915, Chap. 84.

#### Texas.

All property acquired by either the husband or wife during marriage, except that which is the separate property of either one or the other, shall be deemed the common property of the husband and wife, and, during coverture, may be disposed of by the husband only; provided, however, the personal earnings of the wife, the rents from the wife's real estate, the interest on bonds and notes belonging to her, and dividends on stocks owned by her shall be under the control, management and disposition of the wife alone, subject to the provisions of 4621 as hereinabove written; and further provided that any funds on deposit in any bank or banking institution, whether in the name of the husband or wife, shall be presumed to be the separate property of the party in whose name they stand, regardless of who made the deposit, and, unless said bank or banking institution has provided to the contrary, it shall be governed accordingly in honoring checks and orders against such account. (Section 4622 Vernon's Sayle's Texas Civil Stats. 1914.)

## Washington.

Property, not acquired or owned as prescribed in the next two preceding sections, acquired after marriage by either husband or wife, or both, is community property. The husband shall have the management and control of community personal property, with a like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof. (Section 6892 Remington's Comp. Stats. Washington 1922, Vol. 2.)

# Appendix B

# RIGHTS OF THE WIFE TO COMMUNITY PROPERTY IN SPECIAL CASES.

In Texas, in the special case where the husband abandons the wife and the necessities of the case demand it, she may act as a *feme sole* in the management and disposition or sale of the community property. (*Railway v. Redeker*, 75 Tex. 310, 12 S. W. 856.)

In New Mexico, whenever the husband is non compos mentis, or has been convicted of a felony and sentenced to imprisonment for a period of more than one year, or has abandoned his wife and family and left her and his family, if they have children, without support, or is an habitual drunkard, or for any other reason is incapacitated to manage and administer the community property, the wife may acquire the power through court proceedings to manage, administer and dispose of community property (Section 2767, New Mexico Code of 1915) and in New Mexico whenever husband and wife shall have permanently separated and no longer live or cohabit together as husband and wife, either may institute suit for a division of property, without waiting for or obtaining a divorce. (Section 2774, New Mexico Code 1915.)

In California, ever since 1917, whenever the husband wilfully deserts the wife or when the husband wilfully fails to provide for the wife, or when the wife has any cause of action for divorce as provided in Section 92 of the California Civil Code, the wife may, without applying for divorce, maintain an action

against her husband for support and maintenance, in which, if the wife is successful, the court must divide the community property (California Civil Code 137, as amended by Statutes 1917, p. 35.) In California, ever since 1919, the wife in cases where the husband has become insane, may acquire through court proceedings power to sell and convey, mortgage and lease community real property (California Civil Code, Section 172b as added to the Civil Code by Stats. 1919, p. 1284), and since 1921 the wife may acquire the same power, in the same way whenever the husband shall become incompetent. (California Civil Code, Section 172b as amended by Stats. 1921, p. 91.)